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No. _____

In the
Supreme Court of the United States

October Term 1999

DAVID P. HOULT,
Petitioner,

v.

JENNIFER HOULT,
Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the First Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Whether, when a party to a civil action expects to introduce expert opinion testimony in a jury trial concerning new scientific theories, methods, or techniques, the trial judge is obliged to make a explicit determination before such testimony is presented to the jury that such testimony relates to scientific knowledge as defined by this court in *Daubert* v. *Merrell Dow Pharmaceuticals, Inc*, 509 U.S. 579, 113 S.Ct. 2786 (1993) and Federal Rules of Evidence 702 and 104(a), or whether, in the alternative, it is satisfactory that the trial judge assesses that proffered testimony *sub silentio* unshackled by the necessity of making any findings on the record concerning the reliability or the validity of that testimony as "scientific knowledge?"

Whether the proposed introduction in evidence of testimony relating to new scientific theories and techniques concerning the recovery by an adult in psychotherapy years later of allegedly repressed memories of childhood sexual abuse requires an explicit determination on the record by the trial judge that such proposed testimony relates to "scientific knowledge?"

Whether the judgment of dismissal of the complaint in this action under the doctrine of collateral estoppel (issue preclusion) must be reversed or vacated because the only relevant evidence in the earlier action was uncorroborated testimony concerning memories of sexual abuse and their recovery, previously long "repressed," now "recovered" in psychotherapy, where the trial judges made no determination of record in either the earlier or later action that such testimony, either of the purported victim or her scientific expert, or both, related to "scientific knowledge" as that term is discussed in *Daubert* v. *Merrell Dow Pharmaceuticals, Inc*, 509 U.S. 579, 113 S.Ct. 2786, 125 (1993)?

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PETITION FOR WRIT OF CERTIORARI

Petitioner David P. Hoult respectfully requests that a writ of certiorari issue to review the decision of the United States Court of Appeals for the First Circuit in this case.

OPINIONS BELOW

The decision of the United States Court of Appeals for the First Circuit is reported at *[David P.] Hoult v. [Jennifer] Hoult*, 157 F.3d 29 (1st. Cir. 1998) (App. 1-6) ("Hoult #2"). It holds that David P. Hoult is collaterally estopped from "relitigating" "the central issue" (alleged repeated "rapes") litigated in *[Jennifer] Hoult v. [David] Hoult*, United States District Court for the District of Massachusetts Civil Action No. 88-1738, an unreported action ("Hoult #!"). A decision of the United States Court of Appeals for the First Circuit denying relief to defendant David P. Hoult in that action, pursuant to Fed. R. Civ. P. 60, is reported at *[Jennifer] Hoult v. [David P.] Hoult*, 57 F.3d 1 (1995) (App. 8-21).

JURISDICTION

The decision of the United States Court of Appeals for the First Circuit was entered on October 9, 1998. On November 9, 1999, that court denied a timely filed petition for rehearing (App. 7). On February 16, 1999, Justice Souter of this court extended the time within which to file a petition for a writ of certiorari to and including March 10, 1999.

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254 (1).

APPLICABLE PROVISIONS OF THE FEDERAL RULES OF EVIDENCE

Federal Rule of Evidence 104(a) provides:

Preliminary questions concerning the qualification of a

person to be a witness, the existence of a privilege, or the admissibility of evidence shall be determined by the court, subject to the provisions of subdivision (b) [pertaining to conditional admissions]. In making its determination it is not bound by the rules of evidence except those with respect to privileges.

Federal Rule of Evidence 702 provides:

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

Federal Rule of Evidence 703 provides:

The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence.

STATEMENT OF THE CASE

Plaintiff's complaint claimed jurisdiction in the United States District Court under 28 U.S.C. § 1332.

This a repressed memory case; it raises the issue of the evidentiary reliability of testimony based on "memories" that were entirely absent from the consciousness of a witness for a lengthy period of time, purportedly because they had been "repressed," only to have been recovered in an allegedly historically accurate form in psychotherapy years after the traumatic events they relate to and to have been offered in the courtroom later as historically accurate.

At issue in this petition is the interpretation and application of this court's teachings in *Daubert* v. *Merrell Dow Pharmaceuticals, Inc*, 509 U.S. 579, 113 S.Ct. 2786 (1993), to include a conflict

between the United States Court of Appeals for the First Circuit and the United States Courts of Appeals for several other Circuits on whether *Daubert, supra*, requires a trial judge as part of his gate-keeping responsibility to make a determination on the record before scientific evidence is proffered to a jury that such evidence is reliable because rooted in scientific knowledge or whether, by contrast, it is sufficient under *Daubert, supra*, that the trial judge need only assess such evidence *sub silentio* as it is presented.

The issues presented here arise in the context of the trial court's gate-keeping responsibilities with respect to the introduction in evidence of proffered expert opinion testimony relating to new scientific theories and techniques concerning the alleged recovery by an adult in psychotherapy years later of "memories" of repeated sexual abuse allegedly "repressed" for more than two (2) decades during childhood, and the (non)application by the trial court of Federal Rules of Evidence 104(a), 702, and 703 to the evidence from such memories and concerning the manner of their "recovery."

Also at issue is petitioner's contention that the United States Court of Appeals for the First Circuit has decided federal questions under Federal Rules of Evidence 104(a), 702, and 703 in a way that conflicts fundamentally with the decision of this Court in *Daubert* v. *Merrell Dow Pharmaceuticals, Inc*, 509 U.S. 579, 113 S.Ct. 2786, 125 (1993).

Thus, this is a civil case at the heart of which is the evidentiary reliability of the theory and practice of so-called recovered memory therapy.

The theory, as is relevant here, advances the notion that conscious knowledge of allegedly oft-repeated sexual abuse of a young daughter perpetrated by her father, more often than her weekly music lessons but less often than her daily breakfast (the phrase is hers), for more than a decade during her childhood (from age 4-16) is more likely to be totally "repressed" by the victim than one such act.

Proponents of the practice of recovered memory therapy, which is squarely based on the theory, contend that the purported victim can be led, even decades later, to recover, as an adult, historically accurate memories of such repressed trauma in psychotherapy. In a typical version of such recovered memory therapy, it is further contended by its proponents that the daughter,

having now recovered memories of past sexual abuse by her father, may contribute to her own healing by suing her father.

The instant matter involves allegations of repeated sexual abuse made by an adult daughter against her father relating back to her childhood years. The allegations all involve alleged acts of abuse that the daughter (claims she) did not remember at all until years after they purportedly occurred. In this case, the daughter recovered for the first time her only "memories" of the abuse 23 years after they began, 11 years after they ended, and then only after 7 years in Gestalt psychotherapy.

The alleged abuse was not corroborated in any fashion, not by school records, medical records, or the testimony of any of the other five members of her household over those twelve or so years.

The daughter sued her father for money damages. She avoided the normal statute of limitations problems by claiming, under the Massachusetts discovery rule, that she had absolutely no memory of the alleged abuse until she first discovered it in psychotherapy at age 24 in 1985, a bit less than three years before she commenced her action against her father.

The case was first tried to a 6 person jury for settlement purposes under a practice in the United States District Court for the District of Massachusetts; the father prevailed. The case then went to an eight day jury trial in that court in 1993. The father testified for 20-30 minutes during those eight days; he denied he ever abused his daughter. Most of the rest of the trial consisted of the testimony of the daughter about the memories she recovered in psychotherapy, the testimony of her unlicensed psychotherapist who testified to the same thing, and, principally, to the testimony of Renee Brant, M.D. as an "expert" witness on the theory and practice of recovered memory therapy.

Dr. Brant celebrated recovered memory therapy, vouched for the truthfulness of the daughter (App, 17-18)[1], and even explained that the reason the daughter's mother was unaware of the alleged abuse over those many years was her "denial," this even though

[1] Dr. Brant has a reputation for vouching for the credibility of witnesses on whose behalf she appears. *See Commonwealth* v. *Federico*, 40 Mass. App. Ct. 616, 666 N.E.2d 1017 (1996), *further appellate review granted* 423 Mass. 1111, 672 N.E.2d 538 (1996), *affirmed* 425 Mass. 844, 683 N.E.2d 1035 (1997); *Commonwealth* v. *Perkins*, 39 Mass. App. Ct. 577 (1995).

Dr. Brant never even interviewed the mother. Dr. Hoult's trial attorney did not object to the testimony of Dr. Brant at trial (often in the form of monologues occupying pages of transcript without interruption) and he did not call any expert witness to testify on behalf of Dr. Hoult.

The jury returned a general verdict in favor of the daughter and against her father in the amount of $500,000.00, which, with interest, has become a judgment in the neighborhood of $1,000,000.00 at the present time.

After trial, the father filed a motion for a new trial, which was denied. He filed a notice of appeal from both the judgment and the denial of the motion for a new trial, but did not prosecute them. They were dismissed for lack of prosecution.

The daughter then appeared in numerous venues to proclaim publicly, orally and in writing, that her father had "raped" her repeatedly during her childhood. In particular, she filed ethics complaints against Dr. Elizabeth F. Loftus with the American Psychological Association ("APA") and the British Psychological Society ("BPS"). Dr. Loftus, a very distinguished scholar, was not involved in the original case but had written about it in terms the daughter thought unfavorable to her. As Dr. Loftus had resigned from the APA to become a member of the research-oriented American Psychological Society (of which organization she is now president), the APA did not act on the daughter's complaint. The BPS dismissed the complaint as without merit. The daughter sought to block the appearance of Dr. Loftus as an invited speaker at the meetings of several professional societies. As part of this effort, the daughter distributed copies of her ethics complaints to the officers and directors of such societies and also threatened suit if Dr.Loftus were allowed to appear. Those ethics complaints several times state that her father routinely "raped" her during her childhood years. Those allegations were made to an audience largely in the academic community (although not exclusively). Her father was a professor at the Massachusetts Institute of Technology,

The father brought a defamation action against the daughter. The daughter defended by asserting that the judgment in the original case provided a defense. The father argued that the jury in the original case had returned only a general verdict on claims of (assault and) battery, intentional infliction of emotional distress,

and breach of fiduciary duty and that there were no special questions answered by the jury so that there was no way one could determine why the jury decided the case as it did. Thus, the father argued, the result in the original case did not establish repeated rapes and for the daughter to say and write so was defamatory (App. 1, 3, 4).

The motion judge denied the daughter's motion to dismiss the complaint, but, then, on reconsideration, granted it, arguing that Dr. Brant's testimony on repressed memories combined with the jury's determination that the daughter had not discovered, for statute of limitations purposes, any of the rapes until she was twenty-four had in fact established as a practical necessity that her father had repeatedly raped her, thereby precluding him, on collateral estoppel grounds, from "relitigating" in the later defamation action the issue of repeated rapes.

As the first Circuit also put it (in a sentence somewhat mysterious in its second clause): "Dr. Brandt testified that repeated sexual abuse can cause repression of memory of the abuse and that Jennifer Hoult's symptoms "correlated" with such a syndrome." The father appealed to the First Circuit, which affirmed the judgment of dismissal in the trial court. *See Hoult v. Hoult*, 157 F.3d 29 (1st Cir. 1998) (App. 6).

The First Circuit decision appears to turn on the notion that the jury found that the daughter had not discovered that she had been sexually abused more than three years before she commenced her action against her father (thereby allowing her the benefit of the Massachusetts discovery rule against a statute of limitations defense), that to do this the jury had to credit the "expert" testimony of Dr. Brant on the "repression" and recovery of memories of trauma:

> "repression required 'repeated acts' of sexual abuse; and the only repeated acts of sexual abuse (Jennifer Hoult argued) were her descriptions of five separate incidents of rape."

(App. 3)

This concept—the counter-intuitive suggestion that the more frequent the trauma the more likely it is to be forgotten or "repressed"—is sometimes referred to as Type II "repression" by

proponents of recovered memory therapy. It is described by the Royal College of Psychiatrists, as follows (see App. 56):

> Some workers have suggested (Terr, 1991; Herman, 1992; van der Kolk & Fisler, 1995) that memories of repeated sexual abuse are laid down in the brain through a unique process which does not apply to other forms of trauma and which results in total loss of awareness both of the trauma and also of the amnesia. They argue further that the emotional component of a traumatic event can be stored as an implicit memory, even while the terror of the event prevents its being recorded as an explicit memory trace. These memories, they claim, may then return via the sensori-motor system as context-free, meaningless, kinesthetic sensations, smells, tastes or visual things, often marked by intense emotional reactions. This remains an unproven hypothesis.

In short, the First Circuit itself determined in the defamation action that Jennifer Hoult had established repeated rapes in the original action through the "expert" testimony of Dr. Brant in that original action, that the issue of repeated rapes was "ultimately a credibility contest between two opposing parties, and not open to "relitigation" in the defamation action on collateral estoppel grounds."

In *Hoult #2*, the First Circuit characterized *Hoult #1* as a credibility contest. (App. 6). This, however, is decidedly not the case.

In *Hoult #1*, Jennifer Hoult had NOTHING to testify about apart from what she had "repressed" and later "recovered" in psychotherapy. Renee Brant served to tell the jury about the recovered repressed memory theory and practice and to vouch for Jennifer's truthfulness. No judicial evidentiary gatekeeper ever determined that such theory or practice was based on reliable scientific knowledge. None ever tried.

It is quite clear, as the court itself explicitly recognizes in *Hoult #2*, that Jennifer Hoult's testimony rests entirely on the theory and techniques of so-called repressed memory recovery as

historically accurate. Repressed memory therapy—theory and practice—is not and never was generally accepted as rooted in scientific knowledge in the relevant scientific community. Worse, the courts below, all the while they credit recovered memory therapy as historically accurate, have never addressed the indisputable fact that there never has been a showing of any sort that the theory or practice of recovered memory therapy is rooted in scientific knowledge, as discussed in *Daubert, supra.*

So-called "expert" testimony on scientific issues is not admissible without a threshold determination by the trial judge, acting as an evidentiary gate-keeper, that such testimony is rooted in reliable scientific knowledge. An M.D. from Harvard Medical School ought not be allowed to testify to a jury as an expert on alien abductions because of his or her degrees. He would have to show, first, that his proffered testimony came out of reliable scientific knowledge. That Dr. Brant chooses to adopt the ideological fad of recovered memory therapy does not make her testimony properly admissible under Fed. R. Evid. 702, whatever her degrees. A threshhold showing that proffered expert testimony on scientific issues must reflect reliable scientific knowledge is a centerpiece of *Daubert, supra.*

As the court says in *Hoult #2*: Jennifer Hoult sought to overcome the statute of limitations obstacle to the commencement of her action against her father by showing that the alleged abuse caused her to repress her memory of the events until she began to recapture those memories during therapy sessions in October 1985. The court also acknowledges, as it must, that the claim of repressed memories was "supported" at the trial in *Hoult #1* by testimony from psychiatrist, Dr. Renee Brant, who appeared as an expert witness on repression caused by traumatic abuse. The court also opines, in effect, that Dr. Brant's testimony led the jury to find that Jennifer Hoult had repressed memory of the abuse until it was rediscovered "within the limitations period" (as extended).

Again, as the court also correctly recognized, Jennifer Hoult argued that the jury's finding of repression, in rejecting the statute of limitations defense, was necessarily based on Dr. Brant's expert opinion that the repression required "repeated acts" of sexual abuse; and the only repeated acts of sexual abuse (Jennifer Hoult argued) were her descriptions of five separate incidents of rape. Again, as the court says, Dr. Brant testified that repeated sexual

abuse can cause repression of memory of the abuse and that Jennifer Hoult's symptoms "correlated" with such a syndrome. This court has not said (yet), and cannot say, that the Hoult-Brant testimony was rooted in reliable scientific knowledge, or that any judicial evidentiary gate-keeper made such a determination.

This is NOT a credibility issue between Jennifer Hoult and David Hoult; it is a cynical assault on the rules of evidence, as endorsed and interpreted by this court. The First Circuit is clear: the issue of repeated rapes was the central and pivotal issue in *Hoult #1*. In its view (in *Hoult #2*), the jury necessarily decided that repeated rapes had actually occurred. It is contended here that the jury did so because no responsible evidentiary gatekeeper met his responsibilities to pass on the Hoult-Brant testimony on recovered memories as reflecting scientific knowledge.

REASONS FOR GRANTING THE WRIT

It is respectfully contended that the United States Court of Appeals for the First Circuit has decided federal questions (1) in a way that conflicts with the decision of this court in *Daubert* v. *Merrell Dow Pharmaceuticals, Inc*, 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed. 2d 469 (1993) and Federal Rules of Evidence 104(a) and 702 and (2) in a way that conflicts with the decisions of other circuits of the United States Courts of Appeals made under *Daubert, supra,* and by state appellate courts..

THE PETITION SHOULD BE GRANTED BECAUSE THE DECISION OF THE FIRST CIRCUIT AND THE *DAUBERT* DECISION ARE AT IRRECONCILABLE ODDS WITH EACH OTHER

On June 28, 1993, the United States Supreme Court decided *Daubert, supra,* which held, *inter alia,* that the Federal Rules of Evidence have superseded the *Frye* test with respect to expert opinion testimony on scientific subjects (*see Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923)). However, this court went on to point out:

> That the *Frye* test was displaced by the Rules of Evidence does not mean, however, that the Rules

> themselves place no limits on the admissibility of purportedly scientific evidence.

This court then discussed the "gatekeeping" responsibility of the trial judge and the nature and source of the trial judge's duty to gatekeep. The court noted that the trial judge has a responsibility to screen such evidence:

> [U]nder the Rules, the trial judge must ensure that any and all scientific testimony or evidence admitted is not only relevant, but reliable [emphasis added]. . . .

The primary locus of this obligation is Rule 702, which clearly contemplates some degree of regulation of the subjects and theories about which an expert may testify. The subject of an expert's testimony must be "Scientific . . . knowledge."

Thus, the trial judge has the responsibility, when scientific evidence is proffered, first, to determine whether the subject of the proposed evidence is scientific knowledge (this whatever the purported qualifications of the expert witness).

It is precisely this determination that the trial judge failed to make in *Hoult* v. *Hoult* and it is precisely this determination that the First Circuit refused to require of trial judges in the First Circuit.

Indeed, despite this Court's clear, vigorous, and unambiguous admonition that "the trial judge must ensure that any and all scientific testimony or evidence admitted is . . . reliable" [emphasis added], the First Circuit explicitly says: "We decline to 'shackle' the district court with a mandatory and explicit reliability analysis."

This puts the First Circuit totally at odds with the teachings of this Court and with the other federal circuits, some of which even hold that the trial judge must hold a hearing to make the determination (1) whether a proposed expert intends to testify as to "scientific knowledge" and (2) whether he is qualified to do so. These hearings are now commonly called "Daubert hearings" and are widely used with salutary effect in the trial courts pursuant to the teachings of *Daubert, supra.*

Even where *Daubert* hearings are not explicitly required in

circuits other than the First, all of the numerous United States Courts of Appeals that have already addressed this issue have explicitly recognized that the trial judge has an independent gatekeeper's obligation under Federal Rules of Evidence 702 and 104(a) to make the determinations called for by *Daubert, supra. See Hopkins v. Dow Corning Corporation*, 33 F.3d 1116, 1124 (9th Cir. 1994).

It is only the First Circuit that will not "shackle" the trial judge with a mandatory reliability analysis. The First Circuiy, while overruling the Rule 60 motion judge, said as follows:

> We think *Daubert* does instruct district courts to conduct a preliminary assessment of the reliability of expert testimony, even in the absence of an objection.

The First Circuit, nevertheless, goes on to opine that *Daubert, supra*, does not require any on-the-record rulings; instead, the First Circuit states it will assume a *sub silentio* trustworthiness analysis by the trial judge of all evidence introduced at trial. It quotes with approval a case from the Second Circuit that is totally misapprehended for the proposition that the First Circuit will not "burden" the discretion of the trial judge with the necessity of making an explicit determination for all expert testimony on new scientific theories and techniques. It completely ignores the clear admonition of this court that the trial judge had a duty under Federal Rules 702 and 104(a) to determine whether the subject of the proposed evidence is **scientific knowledge.**

The requirement that the trial judge make a preliminary assessment or determination that a proposed expert witness intends to testify to scientific knowledge is, in fact, deeply rooted in Rules 702 and 104(a).

Rule 702, in relevant part, provides that if scientific knowledge will assist the trier of fact, a qualified witness may testify "thereto," i.e. to scientific knowledge, in the form of an opinion or otherwise. Hence follow the *Daubert* requirements that the trial judge must determine first whether the proposed witness will testify to **scientific knowledge** and then whether the proposed witness has the requisite knowledge, skill, experience, training, or education to assist the trier of fact to understand that evidence.

Rule 104(a) provides: "Preliminary questions concerning . . . the admissibility of evidence shall be determined by the court . . . " [emphasis added].

This court continued its analysis in *Daubert, supra*:

> Faced with a proffer of expert scientific testimony, then, the trial judge must determine at the outset, pursuant to Rule 104(a), whether the expert is proposing to testify to (1) scientific knowledge that (2) will assist the trier of fact to understand or determine a fact in issue. This entails a preliminary assessment of whether the reasoning or methodology underlying the testimony is scientifically valid and of whether that reasoning or methodology properly can be applied to the facts in issue. We are confident that federal judges possess the capacity to undertake this review. Many factors will bear on the inquiry, and we do not presume to set out a definitive checklist or test. But some general observations are appropriate [emphasis added].

It is beyond question here (as is clearly disclosed in the transcripts of the trial in *Hoult #1* below) that the trial judge did not meet his obligation under the Federal Rules of Evidence as described in *Daubert, supra.* In addition, he gave no cautionary instruction to the jury on the dangers inherent in the reliance of uncorroborated evidence derived from alleged memories years later of childhood sexual abuse, which memories had (allegedly) been totally "repressed" throughout childhood and early adulthood. It is also clear that the First Circuit does not require that the trial judge make known his reason(s) for his assumed *sub silentio* assessment of proffered scientific evidence.

The trial court and the First Circuit never addressed the threshold issue of "scientific knowledge." Their exclusive focus was on the qualifications of the expert witness, as is explicitly clear from the court's original decision. It does not seem too much to say that the First Circuit missed the entire thrust of *Daubert* on the issue that a trial judge must first determine that a witness will testify to the jury on genuine "scientific knowledge."

Visiting Judge Van Sickle, who presided over *Hoult #1*, never conducted any *voir dire* or other foundational inquiry concerning the evidentiary reliability of the opinion testimony on scientific matters of Dr. Brant in an action where the issue was the scientific validity of testimony concerning alleged "repression" and later "recovery" of "memories." Indeed, this was an issue of first impression in the First Circuit. The trial judge never made any "determination," as required by Federal Rule of Evidence 104(a) and *Daubert, supra*, of whether the expert was proposing to testify to "scientific knowledge." *See Hopkins v. Dow Corning Corporation*, 33 F.3d 1116, 1124 (9th Cir. 1994).

On June 24-June 28, 1993, Renée Susan Brant, M.D., and Eileen R. Jacobson, an unlicensed psychotherapist (who kept no notes of her seven [7] years of therapy sessions with the plaintiff), testifying as expert witnesses on behalf of the plaintiff, proffered their opinions at the trial of *Hoult #1* concerning a theory of the repression of memories of childhood sexual abuse, a theory and techniques of the possibility and practice of their recovery for the first time years later in psychotherapy, the likely veracity of the plaintiff's testimony concerning the memories allegedly recovered years later in psychotherapy, the possibility of sexual abuse in dysfunctional families, the "denial" by family members of the alleged victim whom one would expect to have observed such alleged long-term repetitious abuse in the same household and who did not testify to that effect or did not testify at all, and the "post-traumatic stress disorder" or syndrome allegedly consistent with such alleged trauma.

Dr. Brant reached her opinions after having met with the plaintiff for a total of three hours on two days in 1988 and having had a one (1) hour telephone conversation with Jacobson. There was no physical corroboration or external verification of any sexual abuse from medical or school records, or the like, of the events memories of which had allegedly been repressed and only recovered in therapy years later. *See United States. v. Whitted*, 994 F.2d 444, 446-448 (8th Cir. 1993) [Even though defendant's counsel did not object to the comments of a medical expert concerning a witnesses' credibility in a sexual abuse case where there was no corroborating evidence of the offense alleged, the court held it had authority to correct forfeited errors that affected the trial's essential fairness].

In addition, Judge Van Sickle admitted at trial wholesale "expert" opinion testimony—often presented in the form of an extended monologue—concerning general "correlations" that sometimes exist between the behavior of those who are sexually abused and their abusers, which opinion testimony, concerning even the truthfulness of the plaintiff, was used to support theories that repressed memories of childhood sexual abuse might cause alleged post-traumatic stress disorder and other "syndromes."

There is nowhere in the record of the jury trial any indication that any presiding trial judge ever conducted any foundational inquiry concerning whether any of this testimony was rooted in scientific knowledge or on the propriety or evidentiary reliability or scientific relevance of such testimony, as he was required to do under Federal Rule of Evidence 702 and the teachings of *Daubert, supra.*

On June 30, 1993, counsel made closing arguments, Judge Mazzone (Judge Van Sickel having left on vacation) instructed the jury, and jury deliberations began. Those jury instructions, prepared by Judge Van Sickle, made no mention of the scientific or evidentiary unreliability of evidence arising from the later recovery by an adult of formerly repressed memories of childhood sexual abuse.

On July 1, 1993, the jury returned a verdict for the plaintiff in the amount of $500,000.00 plus interest and costs. Defendant filed a notice of appeal from the judgment entered on that verdict and from denial of his motion for a new trial, which appeals were dismissed for lack of prosecution.

New counsel for defendant Hoult filed a Motion for Relief from the Operation of the Final Judgment on his behalf. The motion judge, Woodlock, J. after a hearing, denied that Motion for Relief from Judgment pursuant to Fed.R.Civ.P. 60 (see App. 8 *et seq.*).

The decision in *Hoult #2* ignores that Jennifer Hoult's testimony was from so-called recovered repressed memories and that there is no legitimate evidentiary basis for a jury (or anyone else) to credit the theory that allegedly underlies repressed memory therapy or the techniques used to recover such alleged repressed memories in some allegedly accurate historical form.

The court's view, at root, is that Dr. Brant has appropriate degrees and may therefore, for that reason, tell the jury what she

will about the "science" of repressed memories, whatever its status as scientific knowledge. Jennifer Hoult's testimony would make no sense to a lay jury without the Brant seal that it was historically accurate and truthful as the relation of recovered repressed memories.

THE PETITION SHOULD BE GRANTED BECAUSE THE DECISION OF THE FIRST CIRCUIT AND DECISIONS OF OTHER CIRCUIT COURTS AND STATE APPELLATE COURTS DECISION ARE AT IRRECONCILABLE ODDS WITH EACH OTHER

In contrast, petitioner submits that those courts that have considered these issues seriously, would not allow either Jennifer Hoult or Renee Brant to testify to a jury from or about recovered repressed memories as they did in *Hoult #1*. *See*, for example *Borawick v. Shay*, 68 F.3d 597 (2d Cir. 1995) and *State v. Hungerford*, 697 A.2d 916 (N.H. 1997) (App. 22 *et seq.*]; *Barrett v. Hyldburg*, 127 N.C. App. 95, 487 S.E.2d 803 (N.C. App. 1997) [on October 20, 1998, Superior Court Judge Sanford L. Steelman, Jr. entered a detailed 13-page written order to exclude all evidence derived from alleged repressed memories Superior Court, Buncombe Co., North Carolina, No. 94 CVS 793.[5]. Plaintiff's counsel conceded that without the repressed memory testimony, there would be insufficient evidence to submit the case to the jury. The case was dismissed with prejudice on the same day.]; *State v. Walters*, 698 A.2d 1244 (N.H. 1997); *Althaus by Althaus v, Cohen*, 710 A.2d 1147 (Pa. Super. Ct. 1998) [presently on appeal to the Pennsylvania Supreme Court]; *Doe v. Maskell*, 342 Md. 684, 679 A.2d 1087 (1996), *cert. denied*, 117 S.Ct. 770 (1997); *Lemmerman v. Fealk*, 449 Mich. 56, 534 N.W.2d 695 (1995); *State v. Quattrocchi*, 681 A.2d 879, 883-888 (R.I. 1996); and *S. V. v. R. V.*, 939 S.W.2d 1 (Tex. 1996); *Commonwealth v. Crawford*, 452 Pa. Super. 354, 682 A.2d 323 (Pa. Super. Ct. 1996), *appeal granted*, 693 A.2d 965 (Pa. 1997), *affirmed* 698 A.2d 1344 (1997).

In *Borawick*, *supra*, an alleged victim of sexual abuse was barred from testifying based on hypnotically-refreshed recollections, *id.* at 597. As the court said: "The specific issue before us [is] the admissibility of testimony about memories of childhood sexual abuse that are recalled for the first time in adulthood following the use of hypnosis as part of psychotherapy."

Reviewing a District Court decision, the Second Circuit understood quite well that it had an obligation to apply the rules of evidence "to protect a defendant against devastating charges," *Id.* at 600-601 It noted that "the popular belief that hypnosis guarantees the accuracy of recall is as yet without established foundation." *Id. at* 602.

The Second Circuit rejected an approach to the evidentiary issue that "depends in considerable part on one's faith in the jury's ability to evaluate the testimony accurately in light of cross-examination, expert testimony relating to hypnosis, and jury instructions." *Id. at* 604. At the end of its opinion, the *Borawick* court discussed appellant's claim that the district court decision she appealed was not consistent with *Daubert, supra.* It noted (at 610) that in following *Daubert, supra,* that Court ruled that judges must determine whether an expert's testimony "is scientifically valid" by examining 1) whether the theory had been tested, 2) whether it had been subjected to peer review, 3) what the potential or known rate of error is, 4) what sort of standards control the technique's operation, and 5) whether the theory or technique has generally been accepted. The inquiry, the Court emphasized, should be flexible. In giving trial judges "the task of ensuring that an expert's testimony both rests on a reliable foundation and is relevant to the task at hand," the Court assigned trial judges "a gatekeeping role" for the admissibility of scientific evidence (following *Daubert, supra*)..

By contrast, the First Circuit, misreading *United States v. Locascio*, 6 F.3d 924 (2d Cir. 1993),[2] has erroneously attributed to the Second Circuit quite a different position from the one it has in fact taken. The First Circuit reads *Locascio, supra,* to say that the Second Circuit endorses the notion that a *Daubert* trial judge should not be shackled with a requirement that he make evidentiary determinations with respect to new scientific theories and techniques under *Daubert, supra,* on the record explicitly; it is enough that he do so *sub silentio.* This reading does a grave disservice to the Second Circuit, whose genuine position is clear in *Borawick, supra,* and *Zuckowicz v. United States*, 140 F.3d 381, 386-387 (2nd Cir. 1998). *See also Zuckowicz, supra*; *Cook v.*

[2] Compare *United States v. Flowal*, 163 F.3d 956, * (6th Cir. 1998) and *United States v. Plunk*, 153 F.3d 1011, * (9th Cir. 1998)

American S.S. Co, 53 F.3d 733, 738 (6th Cir. 1995) [a preliminary finding by the trial judge regarding scientific knowledge is required]; *Gruca v. Alpha Therapeutic Corp.*, 51 F.3d 638, 643 (7th Cir. 1995) [district court erred in refusing to rule at outset of the trial on the admissibility of scientific testimony]; *United States v. Martinez*, 3 F.3d 1191, 1195 (8th Cir. 1993) [the court must conclude that prospective testimony concerns scientific knowledge before it can be admitted in evidence; see also at page 1197 on the difference between old and well-established science, which has been passed upon previously in the courtroom, and new scientific theories, techniques, and methods]. *McKnight v. Johnson Controls, Inc.*, 35 F.3d 1396, 1406 (8th Cir. 1994); *Gier v. Educational Service Unit No. 16*, 845 F.Supp. 1342 (D.Neb. 1994); *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 43 F.3d 95, 1315 ff. (9th Cir. 1995) [on remand; the trial judge must determine what is scientific knowledge].

State appellate courts have also addressed the issue of the evidentiary value of recovered repressed memory testimony. They have done so as they assimilate the teachings of *Daubert, supra*, to the law of evidence in their own jurisdictions.

In *Hungerford, supra* (App. 22-47), the New Hampshire Supreme Court addressed the recovered memory debate straightforwardly and in accord with the teachings of *Daubert* and in very detailed and persuasive detail. It noted, in affirming the trial court, that the trial court had ruled that the State had failed to demonstrate that recovered memory therapy was reliable and that because the witnesses proffered were not ordinary eyewitnesses with ordinary memories, the court must examine the reliability of their "memories." And it also noted that a recovered memory that previously had been completely absent from a witness's conscious recollection, cannot be separated from the process, if any, that facilitated its recovery. The court also observed that the phenomenon of repressing recollection of a traumatic event, and subsequently "recovering" it, is far from being familiar to the average juror and therefore requires expert testimony.

The *Hungerford* trial court applied these principles in the repressed memory context—both to the witness claiming to have recovered memory and to the expert explaining the phenomenon and found the phenomenon of recovery of repressed memories has not yet reached the point where the court may perceive recovered

memories as reliable, that the indicia of reliability present in the particular memories at issue did not rise to such a level that they overcome the divisive state of the scientific debate on the issue.

Statements from the relevant scientific community

Not only have the courts rejected as unreliable testimony concerning recovered repressed memories; all the relevant professional societies have also warned against accepting them as historically true (for example, for courtroom use), unless corroborated.

In December, 1993, the American Psychiatric Association set forth its policy on the alleged later recovery of repressed memories of childhood sexual abuse:

> It is not known how to distinguish with complete accuracy, memories based on true events from those derived from other sources...It is not known what proportion of adults who report memories of sexual abuse were actually abused. Many individuals who recover memories of abuse have been able to find corroborating information about their memories...There is no completely accurate way of determining the validity of reports in the absence of corroborating information.

In June, 1994, the House of Delegates of the American Medical Association at its annual meeting in Chicago adopted certain "Conclusions and Recommendations" (among others), which were contained in a Report of its Council on Scientific Affairs.

That *Report*, in a section titled "Legal Concerns," says:

> To some extent, current concerns about repressed memories can be traced to the lawsuits filed by accusers, particularly those filed against parents. Numerous such lawsuits have been filed by accusers, and it is of course difficult to disprove accusations regarding events that are alleged to have taken place many years or even decades

> earlier. . . . [P]ublic policy may require standards of proof that must be met before allowing suits based on recovered memories to be filed or result in judgments against the accused.

The following Conclusions and Recommendations (among others) contained in that *Report* were in fact adopted:

> The Council on Scientific Affairs recommends that the following statements be adopted . . .
>
> 1. That the AMA recognize that few cases in which adults make accusations of childhood sexual abuse based on recovered memories can be proved or disproved and it is not yet known how to distinguish true memories from imagined events in these cases. . . .
>
> 3. The AMA considers recovered memories of childhood sexual abuse to be of uncertain authenticity, which should be subject to external verification. The use of recovered memories is fraught with problems of potential misapplication.

See "Memories of Childhood Abuse," *Report of the Council on Scientific Affairs of the American Medical Association*, CSA Report 5-A-94, and the "Conclusions and Recommendations" [particularly the first and third of five (5) "Conclusions and Recommendations"] made therein as adopted by the AMA House of Delegates at its Annual Meeting (in June, 1994) .

Britain's Royal College of Psychiatrists has recently adopted a very strong statement on the unreliability of allegedly recovered repressed memories. That Report makes reference to the Reports of other professional societies and to the accumulated literature on the topic. *See* App. 48-85.

CONCLUSION

This case presents questions of exceptional importance. In general, it raises the issue of the scientific reliability of evidence derived from recovered memories previously repressed; it raises

the question of whether or not recovered memory therapy, theory or practice, represents scientific knowledge within the meaning of that term as outlined in *Daubert, supra*. More narrowly, it addresses the tragic consequences of a trial judge failing to make the determinations required by *Daubet, supra*, in a case involving allegations of the historically accurate recovery in psychotherapy of "memories" of abuse allegedly long-"repressed." More specifically still, it focuses on the pre-trial dismissal of plaintiff's defamation action on the ground that he is collaterally estopped from litigating the issue.

Accordingly, petitioner David P. Hoult respectfully requests that his petition for a writ of certiorari be granted. with respect to the questions presented in this petition for such writ.

Respectfully submitted,

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United States Court of Appeals
For the First Circuit

No. 97-2000

DAVID P. HOULT,
Plaintiff, Appellant,

v.

JENNIFER HOULT,
Defendant, Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

[Hon. Reginald C. Lindsay, U.S. District Judge]

Before
Torruella, Chief Judge,
Aldrich, Senior Circuit Judge, and
Boudin, Circuit Judge.

Edward J. Collins for appellant.
Kevin P. O'Flaherty with whom Adrienne M. Markham and Goulston & Storrs, P.C. were on brief for appellee.

BOUDIN, Circuit Judge. In July 1988, when she was 27 years old, Jennifer Hoult brought suit in the district court against her father, David Hoult, alleging assault and battery, intentional infliction of emotional distress, and breach of fiduciary duty. To support these claims, she alleged that her father had sexually abused, raped and threatened her from the time that she was about four years old until she was about sixteen years old.

The statute of limitations presented an obvious obstacle. Jennifer Hoult sought to overcome it by showing that the alleged abuse caused her to repress her memory of the events until she

began to recapture those memories during therapy sessions in October 1985. See M.G.L. 260 § 4C. The claim of repressed memory was supported at trial by testimony from a psychiatrist, Dr. Renee Brandt, who appeared as an expert witness on repression caused by traumatic abuse.

In June 1993, the district court conducted an eight day jury trial in which Jennifer Hoult testified at length, giving detailed descriptions of extensive alleged abuse by her father; in addition to other forms of abuse, she testified to five specific episodes of rape. Supporting testimony was provided by her former therapist and by Dr. Brandt. In defense, David Hoult testified on his own behalf, flatly denying the allegations, but presented no other witnesses.

On July 1, 1993, the jury returned a verdict in favor of Jennifer Hoult and ordered damages in the amount of $500,000. This verdict was preceded by a separate finding by the jury accepting the statute of limitations defense; in effect the jury found that Jennifer Hoult had repressed memory of the abuse until it was rediscovered within the limitations period. David Hoult appealed both from the judgment against him and the denial of a motion for a new trial, but both appeals were ultimately dismissed for lack of prosecution.[1]

Later, Jennifer Hoult wrote letters to several professional associations in which she repeated the charge that her father had raped her. David Hoult then brought the present action in the district court against Jennifer Hoult, claiming that her charge of rape against him was defamatory. Jennifer Hoult moved to dismiss on the ground that the jury verdict in her earlier assault action had determined that David Hoult had raped her and that David Hoult was barred by collateral estoppel from relitigating this finding.

Initially, the district court denied the motion to dismiss, saying that the evidence adduced at the trial could have led the jury to impose liability because David Hoult had sexually abused Jennifer Hoult "in ways that did not amount to rape" or could even have done so on the basis of Jennifer Hoult's testimony that David Hoult had "threatened her with murder, chased her around the house with a knife, and fondled her in a sexual manner, among

other incidents of violence and assault."

By motion for reconsideration, Jennifer Hoult argued that the jury's finding of repression, in rejecting the statute of limitations defense, was necessarily based on Dr. Brandt's expert opinion that the repression required "repeated acts" of sexual abuse; and the only repeated acts of sexual abuse (Jennifer Hoult argued) were her descriptions of five separate incidents of rape. Accepting this argument, the district court allowed Jennifer Hoult's motion to dismiss the action, and David Hoult now appeals.

The governing legal doctrine of collateral estoppel, which we briefly summarize, is largely undisputed; the problem is one of applying the doctrine to this case. Because the prior judgment was a federal court judgment, we look to federal law for its preclusive effect. See Johnson v. SCA Disposal Servs., 931F.2d 970, 974 (1st Cir. 1991). Subject to certain exceptions, the general rule on "issue preclusion" is as follows: When an issue of fact or law is actually litigated and determined by a valid and final judgment, and the determination is essential to the judgment, the determination is conclusive in a subsequent action between the parties, whether on the same or a different claim. Restatement (Second) Judgements § 27 (1982). Neither side disputes that this formulation sets forth the governing law.

David Hoult does not invoke any of the various exceptions, see Restatement (Second), supra, § 28, but instead says--as did the district judge in his original order refusing to dismiss--that there is no proof that the jury ever determined that David Hoult had committed the alleged rapes. The burden is upon Jennifer Hoult, as the party invoking collateral estoppel, to establish that the jury did so determine in the original action. See Commercial Associates v. Tilcon Gammino, Inc., 998 F.2d 1092,1098 (1st Cir. 1993).

Admittedly, the jury made no explicit finding that rapes occurred. Nevertheless, "[a]n issue may be 'actually' decided [for collateral estoppel purposes] even if it is not explicitly decided, for it may have constituted, logically or practically, a necessary component of the decision reached." Dennis v. Rhode Island Hospital Trust National Bank, 744 F.2d 893, 899 (1st Cir. 1984).

The court in the second case may examine the full record in the earlier one to decide "whether a rational jury could have grounded its verdict upon an issue other than that which the [moving party]seeks to foreclose from consideration." Ashe v. Swenson, 397 U.S.436, 444 (1970).

Whether the jury did find, or must have found, rape in the earlier trial is perhaps a question of fact. But where (as here) the question is answered by looking only at the paper record of the earlier trial, appeals courts tend to review the district court ruling de novo.[2] The more difficult threshold issue is how clear it must be that the jury found the fact in question. The maxim of Lord Coke which is sometimes quoted by courts is that "an estoppel must 'be certain to every intent.'" Russell v. Place, 94U.S. 606, 610 (1876). This is more demanding than the "more likely than not" standard commonly applied in civil matters, but sensibly so. Telling a party that it cannot prove or contest a fact of importance in the case at hand is a severe measure. Courts have been willing to take that step only where it is certain that the issue has already been decided in a prior case (normally one involving the same parties), and even then there are numerous escape hatches). Restatement, supra, § 27.

Confronted with a general verdict in the earlier case, courts commonly ask whether a finding was "necessary" to the judgment, and answer the question by looking primarily to the instructions and the result. But a finding is "necessary" if it was central to the route that led the factfinder to the judgment reached, even if the result "could have been achieved by a different, shorter and more efficient route." Commercial Associates v. Tilcon Gammino, Inc.., 998 F.2d 1092, 1097 (1st Cir.1993). And in deciding whether the jury did make and rest centrally upon a finding not expressly made, it is proper to consider--as Dennis said--not only what was "logically" but also what was "practically" a "necessary component of the decision reached." Dennis, 744 F.2d at 899.

Here, the rape charges were the centerpiece of Jennifer Hoult's case. In the opening statement, her counsel said that Jennifer Hoult would have to live with her "memories of the rape, torture, and sexual abuse" by her father and that her father had had

"intercourse" with her. Defense counsel answered that Jennifer Hoult could not have been "raped by her father some 3,000 times, "as she had once claimed, and he promised evidence to show the unlikelihood that numerous rapes could have occurred without detection by other family members.

Jennifer Hoult then testified specifically to five incidents of rape and said that there were other like rapes whose details she could not recollect. On cross-examination by defense counsel, she said:

> I know based on the specific memories that I have of him attacking me and based on my perceptions, and memories of my life as a whole that he assaulted me regularly, and that rape, even the narrower definition [simples sexual intercourse] was a regular part of the way that he assaulted me.

In closing argument, defense counsel--who argued first--said at the outset:

> Specifically, Jennifer alleges that her father sexually abused her. More specifically, Jennifer claims that her father raped her, and I will call your attention now, as I did in my opening statement, that Jennifer describes rape as forcible vaginal intercourse.

In response, Jennifer Hoult's counsel said: "And this is not about hugging and kissing. She is claiming he assaulted her. He raped her. It's not inappropriate hugging and kissing."

A further consideration, stressed by the district court, is Dr. Brandt's testimony and the jury's finding on the statute of limitations. Dr. Brandt testified that repeated sexual abuse can cause repression of memory of the abuse and that Jennifer Hoult's symptoms "correlated" with such a syndrome. In finding that the statute of limitations had run, the only plausible explanation is that the jury accepted Jennifer Hoult's testimony as to the rapes, which were the salient and specific acts of repeated abuse to which she testified.

Theoretically, the jury could have concluded that Jennifer Hoult had made up or imagined the rapes, and it could then have found repressed memory and awarded the $500,000 judgment because of improper sexual fondlings and threats or acts of violence. But this is a wholly unrealistic assessment of a trial in which the rapes were the central and pivotal issue, the fondlings were the preface to the rapes, and the violence was connected to the rapes (either as part of the rapes or to encourage silence). In our view the jury necessarily decided that rapes had occurred.

The present law suit seeks, in the guise of a defamation action, to retry the central issue in the prior assault case between the same litigants. That issue--ultimately a credibility contest between the two opposing parties--was resolved by the jury at the first trial. Whether the jury was right or wrong, its decision about what happened is not now open to relitigation.

Affirmed.

Footnotes:

1. A year after the judgment, David Hoult filed a motion to vacate the judgment under Rule Fed. R. Civ. P. 60(b), primarily attacking the trial court's decision to allow Dr. Brandt to testify on repressed memory. The motion was denied and, when David Hoult appealed this denial, this court affirmed. Hoult v. Hoult, 57 F.3d 1 (1995).

2. See Sunkist Growers, Inc. v. Fisher, 104 F.3d 280, 284 (9th Cir. 1997); Connors v. Tanoma Mining Co., 953 F.2d 682, 684 (D.C.Cir. 1992); Dixie National Life Insurance Co. v. McWhorter, 887F.2d 1564, 1566 (11th Cir. 1989). But see Precision Air Parts, Inc. v. Avco Corp., 736 F.2d 1499, 1502 (11th Cir. 1984).

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 97-2000

DAVID P. HOULT

Plaintiff - Appellant

v.

JENNIFER HOULT

Defendant - Appellee

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FOR THE FIRST CIRCUIT
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ORDER OF COURT

Entered: November 9, 1998

Upon consideration of motion of appellant,

It is ordered that the "Petition for Rehearing" filed in the above-caption appeal is hereby denied.

By the Court:

Phoebe Morse, Clerk

By _____
Chief Deputy Clerk

cc: Edward J. Collins, Esq.
Adrienne M. Markham, Esq.
Kevin M. O'Flaherty, Esq.

Direct Recipients:
Edward J. Collins, Esq.
Adrienne M. Markham, Esq.
Kevin M. O'Flaherty, Esq.

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United States Court of Appeals For the First Circuit
No 94-2034

JENNIFER HOULT, Plaintiff-Appellee,
v.
DAVID P. HOULT, Defendant-Appellant.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

[Hon. Douglas P. Woodlock, U.S. District Judge]

BeforeTorruella, Chief Judge Aldrich, Senior Circuit Judge, and Stahl, Circuit Judge.

Edward J. Collins for appellant.
Kevin P. O'Flaherty, with whom Adrienne M. Markham and Goulston & Storrs were on brief for appellee.

Heard Jan. 11, 1995
Decided May 22, 1995

TORRUELLA, **Chief Judge**.

Plaintiff-appellee, Jennifer Hoult, brought suit against her father, defendant-appellant, David Hoult, in the United States District Court for Massachusetts alleging, inter alia, assault and battery, and intentional infliction of emotional distress. A jury returned a verdict in the amount of $500,000 for plaintiff. Defendant filed timely appeals — first, of the denial of his motion for a mistrial and, second, of the jury verdict -- both of which were ultimately dismissed by this court for lack of prosecution. One year after judgment issued, defendant filed a motion for relief from judgment pursuant to Rule 60(b) of the Federal Rules of Civil Procedure. Defendant appeals the district court's denial of that motion. For the reasons stated herein, we affirm.

BACKGROUND

Plaintiff commenced this action in July 1988 alleging, among

other things, that from the time she was approximately four years old until she was approximately sixteen years old defendant sexually abused and threatened her. Plaintiff alleged that she had repressed all memory of the abuse until she began to recapture those memories during therapy sessions in October 1985, when she was twenty-four.

On February 2, 1993, the parties presented the case at a summary jury trial. Counsel for both parties outlined for the summary jury the evidence they expected to present at trial. The presentation by plaintiff's counsel included a summary of the expected testimony of, among others, the plaintiff, her former therapist, Eileen Jacobsen ("Jacobsen"), and her examining psychiatrist, Dr. Renee Brant ("Dr. Brant"). Defense counsel presented no expert testimony, relying instead on defendant's general denial of the charges and a refutation of the testimony of Jacobsen and Dr. Brant. Defendant prevailed on the merits at the summary jury trial.

On June 24, 1993, the case went to trial. It was tried for eight days. Both Dr. Brant and Jacobsen testified for the plaintiff. On July 1, 1993, the jury returned a verdict in favor of the plaintiff in the amount of $500,000. On July 14, 1993, the district court entered judgment in the case. Defendant moved for a new trial, and that motion was denied in August 1993. Defendant appealed both the denial of his motion for a new trial and the judgment. Both appeals were ultimately dismissed by this court for lack of prosecution.

On July 14, 1994, exactly one year from the date of judgment, defendant, through new counsel, filed a motion to vacate the judgment. The district court denied the motion to vacate in a detailed opinion delivered from the bench at the conclusion of a hearing on defendant's motion. This appeal followed.

DISCUSSION

Defendant asserts essentially four grounds for relief from judgment under Rule 60(b).[1] We address each of these arguments

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[1] Rule 60(b) provides, in pertinent part: On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake,

seriatim below. We note at the outset that district courts enjoy broad discretion in deciding motions brought under Rule 60(b), and we review such rulings only for abuse of that discretion. See Cotto v. United States, 993 F.2d 274, 277 (lst Cir. 1993); Teamsters, Chauffeurs, Warehousemen & Helpers Union, Local No. 59 v. Superline Transp. Co., 953 F.2d 17, 19 (lst Cir. 1992). In addition, our review is limited to the denial of the motion itself. We may not consider the merits of the underlying judgment. Ojeda-Toro v. Rivera-Mendez, 853 F.2d 25, 28 (lst Cir. 1988). Finally, we note that "Rule 60(b)(6) may not be used as a back-door substitute for an omitted appeal, and, in all but the most exceptional circumstances, a party's neglect to prosecute a timeous appeal will bar relief under the rule." Cotto, 993 F.2d at 278.

I

Defendant's primary contention is that the trial judge erred in allowing plaintiff's expert witness, Dr. Brant, to testify with respect to the phenomenon of repressed memory in the context of childhood sexual abuse. Defendant contends that this constitutes "mistake, inadvertence, surprise, or excusable neglect within the meaning of Rule 60(b)(1).

With respect to her qualifications as an expert in the areas of general psychiatry, child psychiatry, and childhood sexual abuse, Dr. Brant testified that she: is a graduate of the Harvard Medical School; has a private psychiatric practice; was a founder of the sexual abuse unit at Children's Hospital; holds a joint appointment as an instructor of medical students at Children's Hospital and Harvard Medical School; serves as a consultant on the treatment of

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inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment.

children who have been sexually abused; has lectured widely on the issue of the treatment and diagnosis of children who have suffered sexual abuse; and has served as an expert witness in several other actions.

Dr. Brant testified generally at trial with respect to the psychological dynamics and clinical profiles of victims of childhood sexual abuse, and also about the phenomenon of repressed memory of traumatic events. She further testified that, based on her clinical evaluation of the plaintiff, there "was a lot of correlation" between the plaintiff's "clinical presentation" and the clinical profile of a childhood sexual abuse victim.

At no time before or during either the summary jury trial or the actual jury trial did defendant object to either Dr. Brant's qualifications as an expert witness or her testimony in general. Nor did defendant present any expert testimony of his own. Instead, defense counsel vigorously cross-examined Dr. Brant, regarding both her theories and techniques in general, and her application of those theories and techniques to her evaluation of the plaintiff. Defense counsel also challenged Dr. Brant's testimony with specific articles and studies by academics and other mental health professionals. The defendant was the only witness to testify for the defense. The defense used essentially the same strategy at trial that it successfully used at the summary jury trial.

Rule 103(a) of the Federal Rules of Civil Procedure provides that a claim of error may not be predicated on the admission of evidence unless it affects a substantial right of the party and a timely objection is made. Defendant nonetheless argues that the Supreme Court's recent decision in Daubert v. Merrell Dow Pharmaceuticals, Inc., ___U.S.___, 113 S. Ct. 2786 (1993), requires the district court to make a sua sponte ruling on the admissibility of expert testimony. Defendant bases this argument

on the following language from Daubert:

> [U]nder the [Federal Rules of Evidence], the trial judge must ensure that any and all scientific testimony or evidence admitted is not only relevant, but reliable.
>
> The primary locus of this obligation is Rule 702. which clearly contemplates some degree of regulation of the subjects and theories about which an expert must testify. . . . The subject of an expert's testimony must be "scientific . . . knowledge." The adjective "scientific" implies a grounding in the methods and procedures of science. Similarly, the word "knowledge" connotes more than subjective belief or unsupported speculation. . . . In short, the requirement that an expert's testimony pertain to "scientific knowledge" establishes a standard of evidentiary reliability. . . .
>
> Faced with a proffer of expert testimony, then, the trial judge must determine at the outset, pursuant to Rule 104(a), whether the expert is proposing to testify to . . . scientific knowledge. . .
>
> .

Daubert, 113 S. Ct. at 2795.[2]

The district court rejected defendant's interpretation of Daubert, primarily because it is inconsistent with Rule 103(a). The

[2] Rule 60(b) provides, in pertinent part: On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment.

position of the district court is consistent with the one federal appeals court decision we found addressing this issue. See McKnight v. Johnson Controls, Inc., 36 F.3d 1396, 1407 (8th Cir. 1994).

Although we agree with the result reached by the district court, we take a somewhat different view of Daubert. We think Daubert does instruct district courts to conduct a preliminary assessment of the reliability of expert testimony, even in the absence of an objection. We do not think, however, that district courts are required, sua sponte, to make explicit on-the-record rulings regarding the admissibility of expert testimony. The reasoning of the Second Circuit in a somewhat analogous case is instructive in this regard.

The two defendants in United States v. Locascio, 6 F.3d 924 (2d Cir. 1993), argued that a district court admitting expert testimony based on inadmissible evidence pursuant to Rule 703 of the Federal Rules of Civil Procedure must make an explicit finding with regard to the trustworthiness of the underlying sources of information upon which the expert relied. The court rejected this argument, stating:

> We decline, however, to shackle the district court with a mandatory and explicit trustworthiness analysis. The district judge, who has the ideal vantage point to evaluate an expert's testimony during trial, already has the authority under Fed. R. Evid. 403 to conduct an explicit trustworthiness analysis should she deem one necessary. In fact, we assume that the district court consistently and continually performed a trustworthiness analysis sub silentio of all evidence introduced at trial. We will not, however, circumscribe this discre-tion by burdening the court with the necessity of making an explicit determination for all expert testimony.

Locascio, 6 F.3d at 939 (citations omitted).

We think Daubert and Rule 104(a) place some burden on the district court judge to make preliminary evaluations with respect to the reliability of evidence, but we decline to "shackle the district court with a mandatory and explicit" reliability analysis. Rather, we assume that the district court performs such an analysis sub silentio throughout the trial with respect to all expert testimony.

In any case, we need not at this time determine the precise contours of the district court's respon-sibility under Daubert. The gravamen of defendant's argument is that the district court wrongly decided a point of law. This is not grounds for relief under Rule 60(b). See Silk v. Sandoval, 435 F.2d 1266, 1267-68 (lst Cir.), cert. denied, 402 U.S. 1012 (1971). See also Rodriguez Antuna v. Chase Manhattan Bank Corp., 871 F.2d 1, 2 (lst Cir. 1989). We conclude that the district court's admission of the expert testimony, even if error -- as to which we express no opinion -- was not a "mistake," as we have defined that term under Rule 60(b)(1). See Silk, 435 F.2d at 1267-68. See also Rodriguez Antuna, 871 F.2d at 2; Scola v. Boat Frances. R. Inc., 618 F.2d 147, 153-54 (lst Cir 1980).

Defendant also asserts, in a similar vein, that Local Rule 26.4(A) of the United States District Court for the District of Massachusetts requires the trial judge to make a sua sponte ruling on the admissibility of expert testimony. This argument . lacks merit. Local Rule 26.4(A) provides that, "[a]t the final pretrial conference, the judge shall consider: . . . making a ruling on the admissibility of expert testimony at the trial." The plain language of this rule merely requires the district court to consider making a ruling on the admissibility of expert testimony; it does not require

the court to make such a ruling.[3]

II.

Defendant's second contention is that an article entitled The Realitv of Repressed Memories, by Elizabeth Loftus, which was published one month before trial, constitutes "newly discovered evidence" within the meaning of Rule 60(b)(2). Rule 60(b)(2) gives the district court discretion to vacate a judgment based upon "newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b)." The article critically examines and questions the reliability of repressed memories, particularly in the context of childhood sexual abuse allegations. Defendant maintains that the article could have been used at trial to challenge the testimony of Dr. Brant.

Defendant's motion to vacate the judgment under Rule 60(b)(2) fails. Because Rule 60(b)(2) is aimed at correcting erroneous judgments based on the unobtainability of evidence, the burden is on the party presenting the new evidence to demonstrate that the missing evidence was "'of such a material and controlling nature as [would] probably [have] change[d] the outcome.'" Anderson v. Cryovac, Inc., 862 F.2d 910, 924 n.l0 (lst Cir. 1988) (quoting 7 J. Moore & J. Lucas, Moore's Federal Practice q 60.23[4] at 60:201-02 (2d ed. 1985) (footnote omitted)); see also Federal Deposit Ins. Corp. v. La Rambla Shopping Cntr., 791 F.2d 215, 22324 (lst Cir. 1986); Bradlev Bank v. Hartford Assurance & Indem. Co., 737 F.2d 657, 662 (7th Cir. 1984). Defendant has

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[3] Defendant also asserts that his trial counsel's decision not to present expert testimony in his case-in-chief, or object to the testimony of Dr. Brant, was a "mistake" or "inexcusable neglect" within the meaning of Rule 60(b)(1). We have repeatedly held that "the acts and omissions of counsel are customarily visited upon the client in a civil case." Cotto, 993 F.2d at 281 (citing Link v. Wabash R.R. Co., 370 U.S. 626, 633-34 (1962)); see also United States v. One lot $25,721.00 in Currency, 938 F.2d 1417, 1421 (lst Cir. 1991); Ojeda-Toro, 853 F.2d at 30. The principle carries particular force in this case because the very defense strategy defendant now objects to was used successfully by defense counsel at the summary jury trial. Thus, not only was defendant fully aware of his counsel's strategy, but presumably he was satisfied with the result at the summary jury trial. We find no justification for departing from the general rule that a defendant is bound by the acts and omissions of his attorney.

failed to demonstrate that the opinions expressed in the pertinent article would probably have changed the outcome of the trial. Indeed, the article is equivocal when it comes to the validity of repressed memories.[4] Its central thesis is simply that more research needs to be done and therapists need to be more cognizant of the possibility that they are "suggesting" childhood sexual abuse. This is hardly the sort of extraordinary "new evidence" contemplated by Rule 60(b)(2).

III.

Defendant next contends that the judgment in this case is "void" within the meaning of Rule 60(b)(4). We have explained that "[a] judgment is void, and therefore subject to relief under Rule 60(b)(4), only if the court lacked jurisdiction or in circumstances in which the court's action amounts to a plain usurpation of power constituting a violation of due process." United States v. Boch Oldsmobile, Inc., 909 F.2d 657, 661 (1st Cir. 1990) (citation omitted). A judgment is not void simply because it is or may have been erroneous; it is void only if, from its inception, it was a legal nullity. *Id.* at 661; Lubben v. Selective Serv. Sys. Local Board No., 453 F.2d 645, 649 (1st Cir. 1972). "In the interests of finality, the concept of void judgments is narrowly construed." Id. at 661 (quoting United States v. Berenquer, 821 F.2d at 22).

Defendant contends that Dr. Brant "usurped the function of the jury" by opining on the plaintiff's credibility. Defendant maintains that admission of this testimony at trial amounted to a violation of due process, and therefore that the judgment is void under Rule 60(b)(4).

Dr. Brant testified that one of the clinical factors involved in her evaluation of sexual abuse patients concerns the potential for fabrication—specifically, whether the patient indicates a motivation to fabricate the claims of sexual abuse. When asked

[4] For example, in her concluding remarks the author notes that "[d]espite lack of corroboration, some of these recollections could be authentic. Others might not be."

whether she developed any opinion with respect to her evaluation of the plaintiff in conjunction with the fabrication factor, Dr. Brant testified, without objection, as follows:

> So to the extent that her feelings about her father were so complex, I think in a situation of fabrication or false allegation what I might expect is someone who is angry, vengeful, wants to out and destroy someone, and this is the means they will use to do it. I didn't see that at all with Ms. Hoult. . . .
>
> . . . I suppose one of the motivations when someone is involved in civil litigation, and you are looking for -- to see money for damages -- is that you try to build as big a case as you can about how much pain and suffering you are in. Well, here she was telling me about . . . many ways in which she was feeling much better. . . . So I thought about that and considered that in relationship to false allegation and fabrication. I felt there was less indication of that. . . . .

It is the function of the jury alone to evaluate the credibility of a witness. This principle carries particular importance in a case, such as this one, where the witness is the alleged victim and a party to the lawsuit. When an expert witness testifies with respect to the credibility of a victim/witness there is a real danger that jurors will lend too much credence to the expert's evaluation of the victim's credibility, at the expense of their own independent judgment of credibility. See United States v. Rosales, 19 F.3d 763, 766 (lst Cir. 1994) ("proffered expert testimony [c]ould create a substantial danger of undue prejudice because of its aura of special reliability and trustworthiness") (quoting United States v. Fosher, 590 F.2d 381, 383 (lst Cir. 1979)).

We addressed this issue recently. In Rosales, the defendant argued on appeal that a portion or the government's expert testimony should have been excluded because it improperly bolstered the testimony of the alleged sexual abuse victims. The

expert testified that children generally "tend to be reluctant, they tend to be embarrassed, uncomfortable, ashamed of what happened. They're very uncomfortable giving details. I see a lot of that. And I saw that in these children." Id. at 765. We concluded that the expert testimony in question "sent an implicit message to the jury that the children had testified truthfully, and this might therefore have interfered with the jury's function as the sole assessor of witness credibility." We held, however, that even if the probative value of the evidence was substantially outweighed by the risk of unfair prejudice,[5] admission of the evidence was not "plain error."[6] Id. at 766.

We think Dr. Brant's testimony may have crossed the line in commenting upon the plaintiff's credibility. Dr. Brant did not limit her testimony to "psychological literature or experience or to a discussion of a class of victims generally." See United States v. Binder, 769 F.2d 595, 602 (9th Cir. 1985), quoted in Rosales, 19 F.3d at 765. Rather, she came perilously close to testifying that this particular victim/witness could be believed. See id. If defendant had properly objected to this testimony at trial, and appealed a decision admitting the testimony, we would be faced with a difficult decision. Because the defendant in this case neither objected to Dr. Brant's testimony, nor appealed its admission into evidence, however, we review not for abuse of discretion or plain error, but only for a "plain usurpation of the jury's function constituting a violation of due process." Boch Oldsmobile, 909 F.2d at 661. "[O]nly 'rare instance[s] of a clear usurpation of power' will render a judgment void." Id. at 662 (citation omitted). The testimony in question did not rise to this level.

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[5] Relevant evidence is admissible unless its probative value is substantially outweighed by the risk of unfair prejudice, confusion, or waste of time. United States v. Arqencourt, 996 F.2d 1300. 1305 (1st Cir. 1993); Fed. R. Evid. 403.

[6] The defendant in Rosales had not objected to the proffered testimony and, therefore, our review was confined to "plain error" rather than abuse of discretion. Rosales, 19 F.3d at 765. Because the defendant in the instant case did not properly appeal the judgment, our review is even more strictly constrained -- we review only for a "plain usurpation of power constituting a violation of due process." See Boch Oldsmobile, 909 F.2d at 661.

We base this conclusion on three factors. First, Dr. Brant was subjected to rigorous cross examination by defense counsel. In particular, defense counsel questioned Dr. Brant with respect to several scholarly articles which contradicted or called into question Dr. Brant's opinions concerning the phenomenon of repressed memories in alleged childhood sexual abuse cases. Second, defense counsel repeatedly attempted to elicit opinion testimony from Dr. Brant that she believed the plaintiff's allegations. Dr. Brant steadfastly refused to give such an opinion, explicitly testifying: "I had no way of ultimately determining whether they were true or not. Finally, the district court instructed the jury as follows:

> You should consider each expert opinion received in this case and give it such weight as you may think it deserves. If you should decide that the opinion of an expert witness is not based upon sufficient education and experience, or if you should conclude that the reasons given in support of the opinion are not sound, or if you feel that it is outweighed by other evidence, you may disregard the opinion entirely.

Thus, the jury was presented with evidence contradicting or calling into question Dr. Brant's opinions, Dr. Brant herself testified that she had no way of knowing whether the plaintiff's allegations were true, and the court expressly instructed the jurors that they were free to reject the opinions offered by Dr. Brant. *Cf. Rosales*, 19 F.3d at 766. Under the circumstances, we conclude that Dr. Brant's testimony did not so plainly usurp the function of the jury as to constitute a violation of due process.

Defendant also contends that plaintiff's therapist, Jacobsen, was improperly allowed to provide expert testimony, and that the jury was therefore "corrupted." Plaintiff maintains that Jacobsen testified only as a fact witness. We have reviewed Jacobsen's testimony and think that at certain points she went beyond what is traditionally allowed for a fact witness.[7] Again, however,

[7] For example, she was allowed to give her opinion that the plaintiff "will always have to struggle with the damage that I think was done."

defendant neither objected to Jacobsen's testimony nor appealed its admission into evidence. Moreover, while some of her testimony might have been objectionable, we do not think its admission was particularly prejudicial. We discern no violation of due process.

IV.

Defendant's final contention is that Judge Mazzone failed to comply with the certification requirements of Rule 63 of the Federal Rules of Civil Procedure when he took over the case for visiting Judge Van Sickle.[8] Defendant contends that this failure constitutes "mistake, inadvertence, surprise, or excusable neglect within the meaning of Rule 60(b)(1).

Just before the close of evidence, visiting Judge Van Sickle informed counsel for both parties that, although he would be able to hear the rest of the evidence in the case, he would be unavailable for closing arguments, the jury charge, and jury deliberations. The parties had already submitted proposed jury instructions to Judge Van Sickle, and he discussed those instructions with counsel. He informed counsel that he would prepare jury instructions for his successor to use in charging the jury. On June 30, 1993, Judge Mazzone held a lobby conference with counsel to discuss his taking over the the case. The transcript of the June 30, 1993, lobby conference speaks for itself.

THE COURT: You all, of course know that this case was originally assigned to me and then went to visiting Judge Van Sickle, and because he is no longer available and is unable to proceed, I am stepping in. Now I know you know I've done a lot of work in the case, but the rules require me to certify that I am familiar with the case, and I will so certify my familiarity with the record in the case. . . . .

If you have any objections to that, the case will not proceed. So, I am calling upon you now to tell me what your objections are.

[8] Rule 63 provides, in pertinent part: "If a trial or hearing has been commenced and the judge is unable to proceed, any other judge may proceed with it upon certifying familiarity with the record and determining that the proceedings in the case may be completed without prejudice to the parties."

All I'm going to do is hear closing statements. I have the instructions that Judge Van Sickle and you have worked out, and I will give those to the jury. I have the jury form which you have worked out and I will give that. So my strong feeling is that we should put this matter behind us, but if you object to it, then I will have to get the whole transcript and I will have to read it.

PLAINTIFF'S COUNSEL: . . . We are content that you're familiar enough with the case and that this certification is sufficient for us to proceed. .

DEFENSE COUNSEL: . . . We are also content, with the request that we be allowed to briefly read through this [proposed jury instructions prepared by Judge Van Sickle].

Defense counsel did not object to Judge Mazzone finishing the case and the transcript plainly indicates that Judge Mazzone did certify his familiarity with the record. Accordingly defendant's claim fails.

V.

As a final matter, we note that defendant makes a general claim for relief under Rule 60(b)(6), asserting that "it would be inequitable that the plaintiff continue to have the benefit of a judgment obtained by what is a manifest miscarriage of justice." For the reasons previously stated herein, we find no exceptional circumstances excusing defendant's failure—on two separate occasions—to prosecute his appeals of this case.

CONCLUSION

The decision of the district court denying defendant's motion to vacate the judgment in this case is affirmed.

THE SUPREME COURT OF NEW HAMPSHIRE

Hillsborough-northern judicial district

No. 95-429

THE STATE OF NEW HAMPSHIRE

v.

JOEL HUNGERFORD

THE STATE OF NEW HAMPSHIRE

v.

JOHN A. MORAHAN

July 1, 1997

Steven M. Houran, acting attorney general (*Cynthia L. White* and *Mark S. Zuckerman*, senior assistant attorneys general, on the brief, and *Mr. Zuckerman* orally), for the State.

Paul A. Maggiotto, of Concord, by brief and orally, for defendant Joel Hungerford.

Brennan, Caron, Lenehan & Iacopino, of Manchester (*Michael J. Iacopino* on the brief), for defendant John Morahan.

Thomas A. Pavlinic, of Annapolis, Maryland, and *Paul A. Maggiotto*, of Concord, by brief for the False Memory Syndrome Foundation, as *amicus curiae*.

Dechert Price & Rhoads, of Philadelphia, Pennsylvania (*Mary A. McLaughlin* on the brief), and *Ford, Ford & Weaver, P.A.*, of Portsmouth (*Debra Weiss Ford* on the brief), for the International Society for Traumatic Stress Studies and the Family Violence &

Sexual Assault Institute, as *amici curiae*.

Mark J. Lopez and *Steven R. Shapiro*, of New York, New York, and *Paul A. Maggiotto*, of Concord, by brief for the American Civil Liberties Union, as *amicus curiae*.

Steven R. Sacks, of Concord, staff attorney, by brief for NEA-New Hampshire, as *amicus curiae*.

BROCK, C.J. The State appeals the Superior Court's (*Groff*, J.) ruling that the testimony of two alleged sexual assault victims is not admissible in criminal prosecutions against the defendants, Joel Hungerford and John Morahan. *See* RSA 606:10, II (1986). We affirm and remand.

For our limited review of the underlying facts, we will rely on the findings that the trial court made for purposes of its ruling on the admissibility of the complainants' testimony. The complainant in *State v. Hungerford*, Laura, is a woman in her late twenties who had suffered from symptoms of clinical depression and had experienced sexual problems in her marriage prior to entering psychotherapy. Although she had no memory of being abused by her father, defendant Hungerford, she sought therapy in September 1992 after her sister claimed to have recovered memories of being sexually abused by Hungerford. Laura began therapy with Susan Jones, a social worker. According to the trial court, Laura explained to Ms. Jones that one of her motivations in entering therapy was to expiore the possibility that she was sexually abused. Ms. Jones engaged in traditional psychotherapy but did engage specifically in "memory retrieval." In other words, a specific purpose of her psychotherapy with Laura was in part to retrieve or recover memories of possible or suspected sexual abuse.

Laura participated in psychotherapy for approximately nine months, including about one hundred sessions; during this period, she "remembered" several episodes of sexual abuse. She recovered several memories of her father penetrating her, digitally, vaginally, and anally. She recovered these during sessions with Ms. Jones, who instructed her "to close her eyes and focus on the image," and to report "who she was afraid of." in order to facilitate

remembering, Laura was instructed to "close her eyes and pretend it was a movie," or to "look around and see what happened."

In March 1993, Laura experienced vaginal pain and a feeling of disgust with her body while taking a shower. A green bar of soap reminded her of a poster above her bed at the family home. She subsequently experienced an "image or flashback" which reminded her that two days before her wedding her father had entered her bedroom, ripped the covers off of her bed, and raped her. Part of this memory seems to have been recalled outside of a particular therapy session, although Ms. Jones did examine the "feeling" with Laura during therapy, and the trial court found that "Laura did recover part or all of the memory of that rape at a therapy session."

Laura reported each of these memories to the Amherst Police Department in March 1993. After the allegations had been made, Hungerford threatened to shoot himself, Laura, and Ms. Jones. Laura and Ms. Jones were aware of this threat. After the defendant made the threat, Laura had a nightmare about black hair, which, after she had drawn a picture of it, Laura recognized as her father's beard. After being instructed to close her eyes, "[l]ook around," and see what was "so terrifying," Laura remembered being tied to a bed with her father beside her, and that something was inside of her vagina. She remembered later, at home, that the object in her vagina had been a gun.

The trial court described Ms. Jones' memory retrieval techniques in some detail:

> During these periods when Ms. Jones engaged in the process of memory retrieval, Laura would close her eyes for 15 or 20 minutes, during which the "memory" would be explored. According to Ms. Jones, during these periods, Laura would go into a "self-induced" trance. Ms. Jones indicated that she did not induce the trance with Laura, but rather Laura was able to "enter the traumatic experience by her own access and design." During these episodes, Ms. Jones would ask Laura if she could see or hear anything or anybody, or if

> anything was happening. These were the only times during therapy[] that Ms. Jones used this "visualization" technique.
>
> Ms. Jones fashioned or relied on a so[-]called "Repressed Memory Syndrome[,"] which appears unrecognized in the field of psychology. Ms. Jones also believed that dreams are often the first signs of emerging memory, that flashbacks are a sudden reliving of a scene of sexual abuse, and that violent nightmares are a red flag for the existence of sexual abuse. Ms. Jones also described the concept of repression to Laura. Ms. Jones believed that Laura's visualizations were memories of actual abuse. She believed that these incidents of abuse occurred, and by her conduct, communicated this belief to Laura. Laura believed that Ms. Jones indicated that body pains were connected to instances of past sexual abuse. Laura believed that Ms. Jones validated the reality of the remembered sexual abuse. Ms. Jones herself understood that by her actions she had validated the abuse and affirmed the memories for Laura.

The complainant in *State v. Morahan*, Sarah, presently is in her early twenties. She reported to the trial court that she had negative feelings about her parents, who had divorced, and reported "suffering from depression, narciss[ism] and bulimia at various stages of her life." Sarah began psychological counseling in May 1988. After having been admitted to two private psychiatric hospitals with suicidal ideation, Sarah attended the DeSisto School, a gestalt, "'therapeutic boarding school[,'] where students are required to attend psychotherapy." While at the school, Sarah ceased taking the antidepressant medication that had been prescribed for her previously.

At the DeSisto School, Sarah reported a recurring dream of a man next to her in bed, and suspected she had been abused; at the same time, she expressed conflicting feelings about her grandfather. In 1991, after another hospitalization for suicidal ideation, she

reported further suspicions of sexual abuse; the school provided Sarah with "inner child therapy" to "support her and offer her belief and comfort, and to determine what had happened." Sarah reported that her stepfather might have "done something to her," and much of her therapy during this period explored the possibility of sexual abuse.

After several months of therapy, in July 1991, Sarah revealed in therapy that she "now remembered being raped by a teacher in the seventh grade." According to the trial court:

In the next few months, Sarah continued to deal with the alleged rape and develop her memory. She indicated that she had become pregnant as a result of the rape and aborted the pregnancy by an overdose of steroids. In therapy, significant effort was directed to grieving over the abortion. One of Sarah's therapists considered her the classic abused child. Sarah also attended dorm group sessions on a regular basis at which participants talked of their problems, including cases of sexual abuse. On June 8, 1993, Sarah[,] accompanied by DeSisto School personnel, reported the rape to the vice-principal at Hillside Junior High School. Thereafter, she recovered further memories of the rape while talking with her dorm supervisor and a therapist. In mid-August Sarah reported the rape to the Manchester Police.

Sarah was not questioned about the details of the assault at the hearing. The instant prosecutions followed.

Both defendants moved to dismiss the prosecutions, asserting that the complainants' testimony would not be admissible at trial under *State v. Cressey*, 137 N.H. 402, 628 A.2d 696 (1993), New Hampshire Rule of Evidence 702, *State v. Coolidge*, 109 N.H. 403, 260 A.2d 547 (1969), *rev'd on other grounds*, 403 U.S. 443 (1971), or *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993). The two cases were consolidated for purposes of addressing the admissibility of the complainants' "repressed memory" testimony. Over the State's objection, the trial court ruled that a preliminary hearing was required to address this question, and that the State would bear the burden of demonstrating that the phenomena of memory repression and recovery are reliable and

have gained general acceptance in the psychological community. The court concluded that "[t]estimony that is dependent upon recovery of a repressed memory through therapy cannot be logically disassociated from the underlying scientific technique." The court required the State to demonstrate "that the reasoning or methodology underlying the testimony is scientifically valid; and that it is capable of empirical testing and can properly be applied to the facts in issue."

The court held a two-week admissibility hearing on the issue of repressed memories. The two complainants testified at the hearing, as did seven psychological professionals: Dr. Daniel Brown, Dr. Bessel A. van der Kolk, Dr. Jon Robert Conte, Dr. Elizabeth Loftus, Dr. Paul McHugh, Ms. Susan Jones, and Dr. James Hudson. After the hearing and a review of the materials admitted during the hearing, the trial court defined a repressed memory as "the complete absence of awareness or memory of a traumatic event from the time of its occurrence until a period of years thereafter." See E. Loftus & K. Ketcham, *The Myth of Repressed Memory: False Memories and Allegations of Sexual Abuse* 215-17 (1994) (describing repression as "a process of selective amnesia in which the brain snips out certain traumatic events and stores the edited pieces in a special, inaccessible memory `drawer'"). The court ruled that the State failed to meet its burden of proving that there was general acceptance of the phenomenon of repressed memories in the psychological community, and, further, that the State had failed to demonstrate that the phenomenon was reliable. The court accordingly ruled the testimony of the complainants inadmissible. This appeal followed.

On appeal, the State argues (1) that the trial court erred in requiring a preliminary showing of reliability or general acceptance before the witnesses' testimony would be admitted, and (2) that, assuming the preliminary showing was required, the trial court erred in concluding that the State failed to make such a showing. The issues raised in these arguments are intimately related, and we address them together.

We accord the trial court's rulings on evidentiary matters considerable deference, reversing only for an abuse of discretion.

See, e.g., State v. Briere, 138 N.H. 617, 620, 644 A.2d 551, 554 (1994). We review the trial court's determination of the reliability of novel scientific evidence with similar deference, *see Cressey*, 137 N.H. at 405, 628 A.2d at 698, although we review the reliability or general acceptance of novel scientific evidence independently when the determination is not likely to vary according to the circumstances of a particular case, *see State v. Vandebogart (DNA)*, 136 N.H. 365, 376, 616 A.2d 483, 491 (1992). The level of scrutiny we employ in our reliability inquiry will depend upon the complexity of the evidence involved and the impact the evidence likely will have on the trial itself. *See, e.g., State v. Murphy*, 451 N.W.2d 154, 157 (Iowa 1990).

We agree with the State that lay witnesses are presumed competent to testify, *see N.H. R. Ev.* 601(a), unless they "lack[] sufficient capacity to observe, remember and narrate as well as understand the duty to tell the truth," *N.H. R. Ev.* 601(b). We disagree with the State's assertion, however, that the trial court's decision "was tantamount to an erroneous ruling that [the witnesses] were incompetent" to testify. There seems to be no question that Laura and Sarah believe that they "remember" the events they describe; accordingly, a pure competence inquiry would likely result in a conclusion that their testimony would be admissible. *See N.H. R. Ev.* 601; *Briere*, 138 N.H. at 620-21, 644 A.2d at 554. An inconsistency in testimony or the failure to remember aspects of some observed event typically does not disqualify a witness on competence grounds; such gaps in testimony "present questions of credibility for resolution by the trier of fact." *Briere*, 138 N.H. at 620, 644 A.2d at 554 (quotation omitted).

The present inquiry is in part a question of competence, however, insofar as we are inquiring into the ability of these witnesses to "remember" the events that they seek to describe at trial. *See N.H. R. Ev.* 601(b); *State v. Iwakiri*, 682 P.2d 571, 578-79 (Idaho 1984) (treating admissibility of hypnotically-refreshed testimony as competence question); *see also State v. Mack*, 292 N.W.2d 764, 769 (Minn. 1980). Because these witnesses are not ordinary eyewitnesses with ordinary memories, we must examine the reliability of their "memories," *cf. People v. Hughes*, 453 N.E.2d 484, 494 (N.Y. 1983) (inquiring into reliability of hypnosis as

means of restoring recollection under general acceptance test), just as we inquire into the reliability of scientific evidence, *see Cressey*, 137 N.H. at 405, 628 A.2d at 698 (expert testimony must reach threshold level of reliability to be admissible). We acknowledge that our inquiry is, in part, into the trial court's determinations concerning the reliability of the victims' memories. Their memories may be actual recollections of actual traumatic events, manufactured narratives of events that never occurred, or some combination of these. *See* Loftus, *The Reality of Repressed Memories*, 48 Am. Psychologist 518, 524-25, 533 (1993) [hereinafter *The Reality of Repressed Memories*]. Laura and Sarah may not know into which category their memories fit. *See* Wells & Murray, *Eyewitness Confidence, in Eyewitness Testimony: Psychological Perspectives* 155, 159-70 (G. Wells & E. Loftus eds., 1984) (eyewitness confidence in memory not meaningfully related to accuracy).

Just as our inquiry is not purely one of competence, it is not purely a question of the admissibility of scientific or expert evidence, to be governed solely by reference to New Hampshire Rule of Evidence 702. We recognize that treating the testimony of a percipient witness to a crime as scientific evidence is novel in our law, and that it does not fit precisely within the confines of Rule 702. *See Com. v. Kater*, 447 N.E.2d 1190, 1195 (Mass. 1983). We agree with the trial court, however, that a recovered memory that previously had been completely absent from a witness's conscious recollection, see E. Loftus, *Memory* 41-44 (1980) [hereinafter *Memory*], cannot be separated from the process, if any, that facilitated the recovery. *See People v. Zayas*, 546 N.E.2d 513, 518 (Ill. 1989). In this context, "[t]he basic question is not so much whether the process is scientific but rather whether a jury can realistically evaluate the effect of [the process]," *Kater*, 447 N.E.2d at 1195, on the witness's ability to testify to his or her recollection of an event. *See The Reality of Repressed Memories*, *supra* at 523-25. The trial court's gatekeeping power on questions of the admissibility of scientific evidence is the most appropriate procedural tool for evaluating this sort of evidence. *See N.H. R. Ev.* 104(a); *State v. Quattrocchi*, 681 A.2d 879, 884 (R.I. 1996). We accordingly conclude that, when challenged, testimony that relies on memories which previously have been partially or fully

repressed must satisfy a pretrial reliability determination. *See Quattrocchi*, 681 A.2d at 884. The trial court correctly ordered the pretrial hearing on admissibility.

The State vigorously argues that the processes of repressing and retrieving memories are normal human functions, common to every person's everyday experience, just as forgetting and remembering are; accordingly, the State contends, such evidence is not beyond the average juror's ability to comprehend, and unique treatment is inappropriate. We disagree. Although there are skeptics, it does seem to be accepted in the psychological community that people are capable of repressing or dissociating conscious recollection of all or part of certain traumatic events. *See, e.g.*, Ernsdorff & Loftus, *Let Sleeping Memories Lie? Words of Caution About Tolling the Statute of Limitations in Cases of Memory Repression*, 84 J. Crim. L. & Criminology 129, 133-34 (1993) [hereinafter *Sleeping Memories*]; Pope & Hudson, *Can Memories of Childhood Sexual Abuse Be Repressed?*, 25 Psychol. Med. 121, 121 (1995); Taub, *The Legal Treatment of Recovered Memories of Child Sexual Abuse*, 17 J. Legal Med. 183, 187 (1996). There is, however, a vigorous debate on the questions of how the process of repression occurs, how the process of retrieval occurs, and indeed if in fact retrieval is possible at all. *See Ault v. Jasko*, 637 N.E.2d 870, 875-76 (Ohio 1994) (Wright, J., dissenting); Hough, *Recovered Memories of Childhood Sexual Abuse: Applying the Daubert Standard in State Courts*, 69 S. Cal. L. Rev. 855, 859-63 (1996). A central and divisive question in this debate is whether a person's memory of an event can be accurate or authentic or "true," having been long lost in the person's subconscious mind and subsequently remembered, either spontaneously or by some method seeking to recover the memory. *See The Reality of Repressed Memories*, *supra* at 523-29; Taub, *supra* at 189-91. *See generally* Pezdek & Roe, *Memory for Childhood Events: How Suggestible is It?*, 3 Consciousness & Cognition 374, 380-83 (1994).

The phenomenon of repressing recollection of a traumatic event, and subsequently "recovering" it, may be familiar to or even accepted by parts of the psychological community, but it is far from being familiar to the average juror. *See Com. v. Crawford*,

682 A.2d 323, 326 (Pa. Super. Ct. 1996). Some well-publicized accusations may ensure that many people have heard of the concept of repressed memories, see Loftus & Ketcham, supra at 79-80 (describing mass media reports of celebrities recovering previously repressed memories); a review of the scientific literature on the subject reveals, however, that ordinary jurors cannot be expected to analyze such claims without the assistance of experts. *See Sleeping Memories, supra* at 162-63; *Crawford*, 682 A.2d at 325.

Our case law is clear that if the subject matter in dispute is beyond the general understanding of a jury, the party bearing the burden of proof must adduce expert testimony to explain such evidence. *Lemay v. Burnett*, 139 N.H. 633, 634-35, 660 A.2d 1116, 1116-17 (1995); *see Crawford*, 682 A.2d at 324-25. Further, expert testimony is required when the issues in a case are particularly esoteric or when the matter to be determined by the trier of fact is so distinctly related to a particular science, occupation, business, or profession that it is beyond the ability of the average layperson to understand. *Wood v. Public Serv. Co.*, 114 N.H. 182, 186, 317 A.2d 576, 578 (1974); *see Lemay*, 139 N.H. at 634-35, 660 A.2d at 1116-17.

The offered testimony of Laura and Sarah in the instant cases, even if admitted, could not be understood by the average juror without the assistance of expert testimony. Their memory of the events described above, according to the theory, has undergone a physiological process unlike ordinary memory, with which an average juror would be familiar. *Compare Wood*, 114 N.H. at 186-88, 317 A.2d at 578-79 (level of insulation required for safe high voltage power lines within understanding of the average juror) *with Lemay*, 139 N.H. at 635-36, 660 A.2d at 1117-18 (jurors could not assess whether particular diving conditions rendered backyard swimming pool unreasonably dangerous without expert testimony). Further, in the instant cases, the memories are intricately related to *the psychological therapy attendant to their recovery. See Note, Recovered Memories of Childhood Abuse: Should Long-Buried Memories Be Admissible Testimony?*, 37 B.C. L. Rev. 591, 630-35 (1996) [hereinafter *Long-Buried Memories*]. Even though the General Court has referred to the phenomenon, it

remains outside of the understanding of the average juror. *See* Laws 1990, ch. 213:1 (findings supporting extension of statute of limitations for certain sexual assaults); *McCollum v. D'Arcy*, 138 N.H. 285, 289, 638 A.2d 797, 800 (1994) (noting that although discovery rule applied to toll statute of limitations, the proponent of recovered memory still bore "the burden . . . to validate the phenomenon of memory repression itself and the admissibility of evidence flowing therefrom"). The trial court properly ordered the State to present expert testimony supporting the reliability of the recovered memories.

We turn to the showing that the proponent must make before evidence of the content of repressed memories will be admissible at trial. New Hampshire Rule of Evidence 702 and the principles we enunciated in *Cressey*, 137 N.H. 402, 628 A.2d 696, guide our analysis. In *Cressey*, we evaluated the admissibility of expert psychological testimony under Rule 702, and concluded that such "testimony must rise to a threshold level of reliability to be admissible." *Id.* at 405, 628 A.2d at 698. We did not define the precise contours of the reliability inquiry for every case, although we did indicate what sorts of concerns ought to guide the inquiry. *See id.* at 408-10, 628 A.2d at 700-02; *State v. Cavaliere*, 140 N.H. 108, 110-13, 663 A.2d 96, 98-100 (1995). Specifically, we considered important the presence of objective, quantifiable evaluation results, *Cressey*, 137 N.H. at 408-09, 628 A.2d at 700-01, the existence of a "logical nexus" between the expert's observations and conclusions, *id.* at 409, 628 A.2d at 701, the verifiability of any interpretive steps, *id.* at 409-10, 628 A.2d at 701, and the likely difficulty of effective cross-examination of the expert, *id.* at 410, 628 A.2d at 701. We apply these principles in the repressed memory context -- both to the witness claiming to have recovered memory and to the expert explaining the phenomenon. Also helpful are the considerations enunciated by the United States Supreme Court in *Daubert*, 509 U.S. at 592-95. In applying Federal Rule of Evidence 702, the *Daubert* Court discussed four considerations bearing upon the reliability and helpfulness of scientific evidence: (1) whether the theory or technique has been or can be tested; (2) whether the theory or technique has been subjected to peer review and publication; (3) the potential or known error rate; and (4) whether there is general

acceptance of the theory or technique in the relevant scientific community. *Id.* at 593-94.

The extensive case law from other jurisdictions considering the admissibility of various types of refreshed recollection in civil and criminal cases is helpful to our inquiry. In the loosely analogous circumstance of offered testimony relying upon memory that has been enhanced, refreshed, or recovered by hypnosis, courts generally have divided into four groups: those that categorically accept such testimony, those that categorically reject such testimony, those that will admit the testimony only if rigid procedural safeguards have been met, and those that will admit the testimony only after a "totality of the circumstances" review of the reliability of the particular testimony. *See, e.g., State v. Brown*, 337 N.W.2d 138, 151 (N.D. 1983) (hypnotically refreshed testimony admissible and subject to credibility challenge); *People v. Shirley*, 723 P.2d 1354, 1383-84 (Cal.) (testimony inadmissible under *Frye* test), *cert. denied*, 459 U.S. 860 (1982); *State v. Hurd*, 432 A.2d 86, 96-97 (N.J. 1981) (admissible if safeguards complied with); *Iwakiri*, 682 P.2d at 579 (testimony admissible if, under totality of circumstances, it is sufficiently reliable to merit admission). Limitations on the admissibility of eyewitness testimony are generally justified based upon the fact that inaccuracies can be injected into recall during the hypnotic process by suggestion, confabulation, and conflation of true memories with false memories, *see Iwakiri*, 682 P.2d at 576, and upon the inability of the adversarial process to ferret out such inaccuracies because of memory hardening, *see e.g., Hurd*, 432 A.2d at 95. *See Cressey*, 137 N.H. at 410, 628 A.2d at 701 (observing that psychologist's testimony of her interpretation of her evaluations was impenetrable by cross-examination). Outside of the preliminary question of whether to toll the relevant statute of limitations, *e.g., McCollum*, 138 N.H. at 289, 638 A.2d at 799, few cases involve the more novel question of the admissibility of repressed memories recovered spontaneously, or during or attendant to participation in psychological therapy. *See Crawford*, 682 A.2d at 327-28; *Quattrocchi*, 681 A.2d at 881-84.

A review of the psychological literature on the subject of memory repression and recovery convinces us that a case-by-case approach,

tempered with skepticism, is most appropriate in this context. *See, e.g., The Reality of Repressed Memories, supra* at 530-32. *See generally* Pezdek & Roe, supra (reviewing studies of suggestibility of children's memories); Williams, *Recall of Childhood Trauma: A Prospective Study of Women's Memories of Child Sexual Abuse*, 62 J. Consulting & Clinical Psychol. 1167 (1994) (suggesting loss of memory of sexual abuse may be common).

We are especially concerned with the influence of therapy on the recovery of memory, as in the instant cases. The process of therapy is highly subjective, with its purpose "not the determination of historical facts, but the contemporary treatment and cure of the patient." *Tyson v. Tyson*, 727 P.2d 226, 229 (Wash. 1986); *see Quattrocchi*, 681 A.2d at 882. This goal, along with the expectations and predispositions of both therapist and patient, tends to distort the "historical truth" of events in the patient's life. *Tyson*, 727 P.2d at 229; see Wesson, *Historical Truth, Narrative Truth, and Expert Testimony*, 60 Wash. L. Rev. 331, 337-38 (1985). Within the environment of therapy, a patient may report memories in response to the perceived expectations of the therapist, *see, e.g.*, Taub, *supra* at 191, or in response to other forces. *See Sleeping Memories, supra* at 138-39; Nelson & Simpson, *First Glimpse: An Initial Examination of Subjects Who Have Rejected Their Recovered Visualizations as False Memories*, 6 Issues in Child Abuse Accusations 123, 126-27 (1994). Observations like the following are troubling:

> [T]he goal of therapy [is to] creat[e] a coherent "narrative truth" that accounts for the events in a patient's life but that does not necessarily make contact with the actual past. The goal is to account for the client's symptoms and allow the client to achieve closure with the past. But the truth of the past is not particularly important; instead, the patient "weaves together" a picture of the past that accounts for his symptoms and allows him to understand his life. Once the past has been reconstructed, however, the past is effectively changed and the original version is lost both for therapy and for all other purposes. The patient's

memory will never be the same.

Comment, *Repression, Memory, and Suggestibility: A Call for Limitations on the Admissibility of Repressed Memory Testimony in Sexual Abuse Trials*, 66 U. Colo. L. Rev. 477, 511 (1995) (quotations, footnote, and brackets omitted) [*hereinafter Call for Limitations*]; see Loftus & Ketcham, *supra* at 265-67.

We do not mean to suggest that all or even a majority of recovered repressed memories are "false." Rather, we merely recognize that the memories are subject to many factors that may affect their reliability, especially, as the trial court found in the instant cases, the uniquely suggestive environment of psychological therapy. *See* Loftus & Ketcham, *supra* at 265-67. *See generally* R. Gardner, *True and False Accusations of Child Sexual Abuse* 652-66 (1992). As we stated in *Cressey*:

> By this opinion we do not seek to disparage the work being done in psychology and the behavioral sciences, for we can surely see its value; however, we are bound to recognize that the separate fields of behavioral science and criminal justice are different enough in their foundations and goals that what may be considered helpful information in one may not be so valued in the other.

Cressey, 137 N.H. at 407, 628 A.2d at 699. Our approach today reflects our attempt to balance "the legal and emotional needs of survivors of childhood sexual abuse," *Roe v. Doe*, 28 F.3d 404, 408 (4th Cir. 1994) (Hall, J., concurring), with our duty to ensure that defendants receive a fair trial and that individuals receive a reliable and fair adjudication of their disputes.

Ordinary memory is imperfect. *See* Hall *et al.*, *Postevent Information and Changes in Recollection for a Natural Event, in Eyewitness Testimony, supra* at 124, 126-27. Studies indicate that memory is not a mechanism that merely reproduces one's perceptions of events; rather,

> memory, like perception, is an active, constructive

> process that often introduces inaccuracies by adding details not present in the initial representation or in the event itself. The mind combines all the information acquired about a particular event into a single storage "bin," making it difficult to distinguish what the witness saw originally from what she learned later.

Note, *Did Your Eyes Deceive You? Expert Psychological Testimony on the Unreliability of Eyewitness Identification*, 29 Stan. L. Rev. 969, 983 (1977); *see Shirley*, 723 P.2d at 1377-78. *See generally Memory*, *supra* at 13-33 (explaining how memory functions).

The law has recognized that an eyewitness's recall of an event or a person's face or features may be irretrievably altered by suggestive identification procedures. *See, e.g., State v. Allard*, 123 N.H. 209, 213, 459 A.2d 259, 262, *cert. denied*, 464 U.S. 933 (1983). Indeed, it may be "that the influence of improper suggestion upon identifying witnesses probably accounts for more miscarriages of justice than any other single factor -- perhaps it is responsible for more such errors than all other factors combined." *United States v. Wade*, 388 U.S. 218, 229 (1967) (quotation and brackets omitted); *see also* Malpass & Devine, *Research on Suggestion in Lineups and Photospreads, in Eyewitness Testimony, supra* at 64, 74-86. Courts accordingly exclude in-court identification that has resulted from an out-of-court identification that is unreliable because tainted by improper suggestion. *See Allard*, 123 N.H. at 213, 459 A.2d at 262.

Our recognition that ordinary memory is subject to suggestion only emphasizes the limitations of eyewitness testimony in <u>any</u> case, *see Sleeping Memories*, *supra* at 155; Hall *et al.*, *supra* at 126-27, and does not conclusively control our evaluation of recovered memories. This point merely establishes the post against which the reliability of recovered memories must be measured. *See, e.g., Hurd*, 432 A.2d at 95. To establish that a recovered memory is reliable, the proponent of its admission must demonstrate a reasonable likelihood that the recovered memory is as accurate as ordinary human memory. *See id.; cf. Shahzade v. Gregory*, 923 F.

Supp. 286, 290 (D. Mass. 1996) (inquiring only into reliability of phenomenon of repressed memories, not into creditability of particular memory). An inquiry into the reliability of recovered memories generally will comprise the first part of this burden. Further, because of the great possibility of suggestiveness in therapy, *see, e.g., The Reality of Repressed Memories, supra* at 526-27, if therapy or some other formal technique has been utilized in order to retrieve the memory -- or has been engaged in during the time in which the memory was retrieved -- then further inquiry is required to determine the effect of that process or technique upon the reliability of the resulting memory. *Cf. Call for Limitations, supra* at 512-14 (describing similarities between effects of therapy, hypnosis, and interrogation on memory).

In determining the reliability of a recovered memory, -- that is, whether the recovered memory is reasonably likely to be as accurate as ordinary memory -- the trial court should consider the following factors: (1) the level of peer review and publication on the phenomenon of repression and recovery of memories, *see Daubert*, 509 U.S. at 593; (2) whether the phenomenon has been generally accepted in the psychological community, see id. at 594; (3) whether the phenomenon may be and has been empirically tested, *see id.* at 593; (4) the potential or known rate of recovered memories that are false, *see id.* at 594; (5) the age of the witness at the time the event or events occurred, *see* Williams, *supra* at 1168; (6) the length of time between the event and the recovery of the memory, *cf.* Hall *et al., supra* at 130; (7) the presence or absence of objective, verifiable corroborative evidence of the event, *see Meiers-Post v. Schafer*, 427 N.W.2d 606, 610 (Mich. Ct. App. 1988); and (8) the circumstances attendant to the witness's recovery of the memory, *i.e.*, whether the witness was engaged in therapy or some other process seeking to recover memories or likely to result in recovered memories, *see* British Psychological Society, *Executive Summary: Recovered Memories* § 2.1, at 9 (1995). *Cf. Isely v. Capuchin Province*, 877 F. Supp. 1055, 1064-67 (E.D. Mich. 1995) (parameters for admissibility of expert testimony).

If the witness was engaged in formal psychological therapy or some other process aimed at, or likely to facilitate, the recovery of

memories, then further inquiry into that process is required. *See Call for Limitations, supra* at 511-12 (describing influence of traditional psychotherapy on memory). In the case of recovery attendant to therapy, this inquiry includes an examination of the therapist's qualifications, the type of therapeutic approach used, whether complaints of false accusations have been filed against the therapist, whether the therapist ordinarily seeks hidden memories or believes that many psychological problems stem from sexual abuse, and whether the therapist remains detached during the process or "validates" allegations of abuse that arise. *See Call for Limitations, supra* at 521 (suggesting some of these factors); *cf.* Nelson & Simpson, *supra* at 125-29 (examining effects of various influences on people who develop false memories); Taub, *supra* at 208-13 (discussing characteristics of individuals who retract claims of recovered memories and their therapists).

Although phrased in different terms, the trial court applied a test of reliability and general acceptance similar to the test we enunciate today. We accordingly defer to its findings insofar as they apply to the facts of these particular cases. *See Cressey*, 137 N.H. at 405, 628 A.2d at 698; *Vandebogart (DNA)*, 136 N.H. at 376, 616 A.2d at 491.

Considering our first factor, the trial court correctly observed that the phenomenon of memory repression and recovery has received extensive attention in psychological publications. The parties presented photocopies of many articles from medical and psychological publications on the issue, and a review of the literature reveals many more. The level of peer review is high. "[S]ubmission to the scrutiny of the scientific community is a component of `good science,' in part because it increases the likelihood that substantive flaws in methodology will be detected." *Daubert*, 509 U.S. at 593. In the case of repressed and recovered memories, the level of submission is high, but the debate over methodology and the meaning of results continues. *See, e.g.*, Holmes, *The Evidence for Repression: An Examination of Sixty Years of Research, in Repression and Dissociation* 85, 96-98 (J. Singer ed., 1990); *Long-Buried Memories*, supra at 635.

The psychological community remains deeply divided on the

reliability or accuracy of recovered memories. *See Ault*, 637 N.E.2d at 875 (Wright, J., dissenting); *Sleeping Memories*, *supra* at 133-35; Taub, *supra* at 186-87. Despite common support for the phenomenon in the therapeutic setting, scientists rest their rejection of recovery of repressed memories on the absence of confirming laboratory results. *Compare* Pope & Hudson, *supra* at 122-25 (criticizing methodology of clinical studies) *with* Herman & Schatzow, *Recovery and Verification of Memories of Childhood Sexual Trauma*, 1987 Psychoanalytic Psychol. 4(1), 11-13 (reporting high incidence of repression in group therapy study). Of course, ethically, no complete laboratory study could ever be completed on repression of events as traumatic as sexual abuse. *See Sleeping Memories, supra* at 133-34; *Memory, supra* at 80-82.

According to the theory of repression, when a person experiences a particularly traumatic event that is unacceptable to the person's conscious existence, the person may repress the memory of the trauma. *E.g., Sleeping Memories, supra* at 132-33. Although the memory is not permanently "forgotten," it is unavailable to the person's conscious thought process. *Sleeping Memories, supra* at 132. True repression or traumatic amnesia rendering a person unable to remember any part of a traumatic event are distinguished from ordinary forgetting, *see* Loftus et al., *Memories of Childhood Abuse: Remembering and Repressing*, 18 Psychol. Women Q. 67, 68-69, 82 n.1 (1994) [hereinafter *Memories of Childhood Abuse*], motivated forgetting, Pope & Hudson, *supra* at 122, incomplete memory, Williams, *supra* at 1168, and psychogenic amnesia, Loftus & Ketcham, *supra* at 215-16. *Cf.* Terr, *Chowchilla Revisited: The Effects of Psychic Trauma Four Years After a School-Bus Kidnapping*, 140 Am. J. Psychiatry 1543, 1545-47 (1983).

Proponents of widespread repression and recovery of memories of sexual abuse consider several facts to support the phenomenon: the existence of psychogenic amnesia and post-traumatic stress disorder, clinical studies in support of the phenomenon, and the prevalence of patients reporting recovery of repressed memories. *See Long-Buried Memories, supra* at 600-03; *Memories of Childhood Abuse, supra* at 69-70. Discrete memory repression is a different physiological phenomenon from psychogenic amnesia,

where the victim or witness of an extremely traumatic event temporarily may forget ordinary personal details, such as name and address, in addition to the details of the traumatic event. Loftus & Ketcham, *supra* at 215-16. The typical symptoms of post-traumatic stress disorder also do not support fully the notion of complete memory repression. *See, e.g.*, Kinzie, *Posttraumatic Effects and Their Treatment among Southeast Asian Refugees, in International Handbook of Traumatic Stress Syndromes* 311, 314-15, 318 (J. Wilson & B. Raphael eds., 1993) (intrusive memories, recurrent nightmares, and avoidance of memories common symptoms in Southeast Asian refugees with post-traumatic stress disorder); cf. Pynoos & Nader, *Children's Memory and Proximity to Violence*, 28 J. Am. Acad. Child Adolescent Psychiatry 236, 239-41 (1989) (discussing memory disturbance and recall of children with post-traumatic stress disorder differing in severity according to proximity to violence, among other factors).

The clinical studies that support the prevalence of recovery of previously completely repressed memories are subject to some criticism in methodology, as the trial court noted in the instant cases. *See, e.g.*, Pope & Hudson, *supra* at 122-25. For example, in one study, researchers reported that approximately 59% of subjects -- patients who were referred by their therapists as having histories of childhood sexual abuse -- answered affirmatively when asked: "During the period of time between when the first forced sexual experience happened and your eighteenth birthday was there ever a time when you could not remember the forced sexual experience?" Briere & Conte, *Self-Reported Amnesia for Abuse in Adults Molested as Children*, 6 J. Traumatic Stress 21, 23-24 (1993). Reviewers raised the following methodological concerns: the subjects were "recruited" by their therapists; it is unclear whether the reported underlying events were confirmed in any way; it is unclear whether the events were "sufficiently traumatic" to have been remembered at every moment; and an affirmative answer to the question conveys insufficient information to conclude that full repression has actually occurred. Pope & Hudson, *supra* at 123. Finally, the reviewers noted the possibility of suggestion in therapy:

> All [subjects] were in treatment with therapists

> who were part of an "informal sexual abuse treatment referral network[,"] and who, therefore, may have communicated to their patients, explicitly or implicitly, that repression of traumatic experiences was to be expected. With this potential degree of expectation, and with therapists choosing which subjects would receive the questionnaire, it would not be surprising if many subjects answered "yes" to a question that asked if there was ever a time when they could not remember an abuse experience.

Pope & Hudson, *supra* at 123; *see Sleeping Memories, supra* at 134. Other studies are subject to similar complaints. See Pope & Hudson, supra at 123-24 (reporting similar methodological limitations in the study reported in Memories of Childhood Abuse, supra); *Memories of Childhood Abuse, supra* at 71-73 (citing methodological difficulties with previous studies).

Proponents of the phenomenon of recovering repressed memories also rely on the very existence of a large number of patients reporting recovery of repressed memories as validation of the phenomenon. Cf. Loftus & Ketcham, *supra* at 209 ("'Why would anyone invent a story that involved so much anguish and suffering?'").

> The stories the patients tell, they argue, are too vivid and too painful to be the product of imagination or fabrication. The emotional troubles these patients have as adults are consistent with the kind of abuse that they remember, and would not be so consistent and so intense in response to a fabricated memory.

Long-Buried Memories, supra at 603 (footnote omitted). Apart from its circularity, the argument lends more support to the concept of suggestibility of memory than to the phenomenon of repression. *Cf. The Reality of Repressed Memories, supra* at 525; Nelson & Simpson, *supra* at 126-27.

The scientific literature supports the conclusion that, in general, people remember traumatic events well. *See, e.g.*, Malmquist, *Children Who Witness Parental Murder: Posttraumatic Aspects*, 25 J. Am. Acad. Child Psychiatry 320, 324 (1986) ("Recollection of vivid memories of the event were present in all 16 of the children" studied). In fact, experiencing vivid, intrusive thoughts of the event seems to be a more common memory disturbance resulting from severe trauma than repression. *See, e.g.*, Wilkinson, *Aftermath of a Disaster: The Collapse of the Hyatt Regency Hotel Skywalks*, 140 Am. J. Psychiatry 1134, 1137 (1983) (repeated recollection of event most frequent symptom among those experiencing collapse). In a study examining the effects on a group of children kidnapped on their school bus, for example, examiners found the children to have intact and detailed memories of the event, although they did observe some memory disturbance. Terr, supra at 1545-46; see also *Weine et al., Psychiatric Consequences of "Ethnic Cleansing": Clinical Assessments and Trauma Testimonies of Newly Resettled Bosnian Refugees*, 152 Am. J. Psychiatry 536, 540-41 (1995) (many survivors' lives "inundated with traumatic images," while in others, "cognitive overload of the genocidal traumatic experience creates an incomplete perception and registration of the traumatic event").

There have been some cases where repression and later retrieval of a memory of childhood sexual abuse have been claimed to be corroborated from other sources, thus enhancing the credibility of the phenomenon and increasing its acceptance with some therapists. *See Sleeping Memories, supra* at 134. A recent review of the literature, however, caused the reviewer to note that "despite over sixty years of research involving numerous approaches by many thoughtful and clever investigators, at the present time there is no controlled laboratory evidence supporting the concept of repression." Holmes, *supra* at 96; *see* Taub, *supra* at 188. The scientific community is extremely divided, at best, on the issue of recovery of completely repressed memories.

> A degree of scientific divergence of opinion is indeed inevitable, but the degree of divergence surrounding [recovery of repressed memories] is fundamental and goes to the very validity of the

> process itself. This kind and degree of divergence is notably absent in other areas of scientific evidence generally deemed admissible.

Reed v. State, 391 A.2d 364, 376 (Md. 1978). We cannot say that the phenomenon has gained general acceptance in the psychological community. *Cf. Daubert*, 509 U.S. at 594.

We turn to the next consideration, whether the phenomenon may be empirically tested. As noted in the foregoing discussion, it would be impossible, ethically, to test repression and recovery of memory of severely traumatic events in a laboratory setting. *See Sleeping Memories*, *supra* at 134. Almost all studies of the phenomenon to date, accordingly, involve subjects in the clinical or therapeutic context. *See, e.g.*, Briere & Conte, *supra* at 23-24; Herman & Schatzow, *supra* at 2-4. Further, the studies of memory of childhood sexual abuse involve retrospective self-reporting of prior, typically uncorroborated, sexual abuse. *See, e.g.*, Briere & Conte, *supra* at 23-24 (describing participant description of childhood abuse); Herman & Schatzow, *supra* at 2-3, 10 (reporting that participants were able to obtain confirmation of earlier abuse). One exception is the study by Linda Meyer Williams, who interviewed 129 women who had been treated for sexual abuse in a metropolitan hospital as children approximately seventeen years earlier. Williams, *supra* at 1169. Of these, forty-nine women, or 38% of the sample, did not report the childhood abuse to the interviewer. Williams, *supra* at 1170. Williams states that "[a]lthough some of these women may have simply decided not to tell the interviewers about the abuse, additional findings discussed later suggest that the majority of these women actually did not remember the abuse." Williams, *supra* at 1170. The "findings" to which she refers include the relative openness of the subjects in answering other personal questions, including other incidents of sexual, physical, or emotional abuse. Williams, *supra* at 1170. Another study has concluded that nonreporting of remembered abuse might be explained by "embarrassment, a wish to protect parents, a sense of having deserved the abuse, a conscious wish to forget the past, and a lack of rapport with the interviewer." Pope & Hudson, *supra* at 124 (quotation omitted). Considering this similar study, Pope and Hudson concluded that it would be "hazardous to

conclude that Williams' 49 `non-reporters' actually had amnesia." Pope & Hudson, *supra* at 124. Although empirical testing is difficult, and subject to some methodological complaints, it is possible.

It is difficult to estimate the number or rate of recovered memories that are "false." *Cf. Daubert*, 509 U.S. at 594. Although some individuals who have recovered memories have since withdrawn their claims, Nelson & Simpson, *supra* at 126-28, there is no way to track the percentage of such false memories, especially when the phenomenon is still subject to such vigorous debate. *Cf.* Gardner, *supra* at 661-64.

The remaining factors of the reliability inquiry relate to Laura's and Sarah's memories themselves. The aspects of the memories into which we inquire are, in part, factual; we therefore defer to the facts found by the trial court in this part of the inquiry. *See, e.g., State v. Carroll*, 138 N.H. 687, 696, 645 A.2d 82, 87 (1994). The charged acts in *State v. Hungerford* rely on Laura's memories of Hungerford inserting a gun into her vagina in 1990 and of him raping her two days before her wedding in 1991 when she was twenty-two and twenty-three years old, respectively. She began therapy in September 1992 with no memories of the assaults and reported them to the police in March 1993. The length of time between the event and remembering was approximately one and a half years, although the period was longer for the uncharged events. Laura's therapist, Ms. Jones, testified to what she perceived as corroborative evidence: the similar claims of Laura's sister, Amy; the remarks of Laura's mother regarding Hungerford's sexual habits with her and his conduct in the household when the girls were children; and the remarks of staff members at the therapy center where Hungerford was attending therapy.

According to the indictments, the charged acts in *State v. Morahan* occurred between December 1987 and March 1988, just before Sarah began psychological counseling in May 1988. She was thirteen years old and in the seventh grade at this time. Sarah recovered her memory of the assault in 1991 and reported it to authorities in 1993. There was no testimony at the admissibility hearing about the details of the assault, and we discern no other

evidence tending to corroborate or not to corroborate the event.

In *State v. Hungerford*, Laura's age and the relatively small period of time between the two charged acts and her recovery of memory about them bear in favor of their reliability. Similarly, in *State v. Morahan*, Sarah's age and the relatively short period of time during which she had no memory of the assault bear favorably on the memory's reliability. Children who are very young are perceived to have incomplete narrative memories even of traumatic events, *see* Pezdek & Roe, *supra* at 375-76; further, scientists generally agree that individuals are almost completely amnestic for the first few years of their own life, *see* L. Terr, *Unchained Memories: True Stories of Traumatic Memories, Lost and Found* 226 (1994). *See also* Briere & Conte, *supra* at 28; *Call for Limitations, supra* at 498-99. Memory is subject to the influence of innumerable external influences during the "retention" stage of remembering, and thus a shorter period of time between the event and recall offers less opportunity for suggestion. *See, e.g.*, Hall et al., *supra* at 132-40.

On the presence or absence of objective, verifiable corroborative evidence, the trial court found that "[i]n neither of these cases was there any corroboration or attempt to corroborate the abuse," although the court did find that both complainants demonstrated "serious psychological disturbances." These findings are supported by the record. There was some witness testimony that might have borne on the question of objective corroborative evidence. For example, the corroborative evidence relied upon by Ms. Jones in *State v. Hungerford* is somewhat convincing. The accusations of Laura's sister are of limited corroborative value. *Compare* Pope & Hudson, *supra* at 123 (alleged abuse of sibling of questionable corroborative value) *with* Herman & Schatzow, *supra* at 10-11 (evaluating claim of sibling abuse as corroborative evidence). Ms. Jones' evaluation of the concerns of Hungerford's therapy center staff offer some additional enlightenment, as do Hungerford's wife's reports. They are not, however, directly corroborative. *Cf. Meiers-Post,* 427 N.W.2d at 609-10 (requiring objective manifested injury and verifiable corroborative evidence, such as an admission by the perpetrator, before tolling statute of limitations). We defer to the trial court's finding that there was no corroboration

of the alleged acts.

We next address the circumstances attendant to the recovery of the memories in the two cases, about which the trial court made extensive findings. In *State v. Hungerford*, Laura was engaged in therapy specifically focused on the issue of sexual abuse. Although on appeal the State attempts to characterize the therapy as being designed to help Laura "understand and cope with her inner feelings," the trial court's conclusion that the focus was recovery or retrieval of memories of sexual abuse is amply supported by the record. Sarah, too, in *State v. Morahan*, was engaged in therapy. Even if we were to agree with the State that Sarah's therapy was not specifically aimed at recovering memories and that she did not recover her memories during any particular therapy session, we would nonetheless defer to the trial court's conclusion that her memories were recovered attendant to therapy. As the trial court found, "it is difficult to distinguish between Sarah's therapy and real life, because it appears . . . that psychotherapy permeated the everyday structure of her school and social life." In its review of the circumstances attendant to the recovery of memories in both cases, the trial court found

> that the psychotherapy utilized by Ms. Jones and by the DeSisto School to "retrieve" Laura's and Sarah's memories of abuse, thoroughly and systematically violated the guidelines and standards of the practice of psychotherapy. Furthermore, the Court finds that the techniques used in the course of psychotherapy in both cases were highly suggestive.

Because the memories in the instant cases were recovered during therapy or while the witness was engaged in therapy, we ordinarily would proceed to examine more closely the circumstances of the therapeutic environment, as discussed earlier. Our review of the memories without regard to the suggestiveness of the therapeutic process, however, convinces us that they do not pass our test of reliability. The phenomenon of recovery of repressed memories has not yet reached the point where we may perceive these particular recovered memories as reliable. "There probably will be

a day, as there has been regarding the forensic use of DNA, when courts can be given reliable, competent information on the issue of repressed memory. That day is not here." *Ault*, 637 N.E.2d at 874-75 (Moyer, C.J., dissenting). The indicia of reliability present in the particular memories in these cases do not rise to such a level that they overcome the divisive state of the scientific debate on the issue.

In a particular case, the court may be satisfied with the state of the scientific debate on the question of recovering repressed memories, and with the general indicators of reliability surrounding a particular recovered memory. If that memory is recovered in the context of therapy, however, we still will be greatly concerned with the suggestiveness of the therapeutic process, and its ability to skew memory and one's confidence in memory. *See* Loftus & Ketcham, *supra* at 150-73. Because we need not engage in that inquiry in the instant cases, however, we shall not.

Affirmed and remanded.

HORTON, J., did not sit; the others concurred.

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REVIEW ARTICLE

Recovered memories of childhood sexual abuse

Implications for clinical practice

S. BRANDON, J BOAKES, D. GLASER and R. GREEN

Background The growth in the USA of' recovered memory therapy for past sexual abuse has caused great public and professional concern. It became apparent that the polarisation of views and fierce controversy within the American psychiatric community was in danger of bringing psychotherapy into disrepute and it seemed important to examine objectively the scientific evidence before such polarisation developed in the UK.

Method A small working group reviewed their own experience, visited meetings and centres with expertise in this field, interviewed 'retractors' and accused parents, and then began a comprehensive review of the literature.

Results There is a vast literature but little acceptable research. Opinions are expressed with great conviction but often unsupported by evidence.

Conclusions The issue of false or recovered memories should not be allowed to confuse the recognition and treatment of sexually abused children. We concluded that when memories are 'recovered' after long periods of amnesia, particularly when extraordinary means were used to secure the recovery of memory, there is a high probability that the memories are false, i.e. of incidents that had not occurred. Some guidelines which should enable practitioners to avoid the pitfalls of memory recovery are offered.

In May 1995 the Royal College of Psychiatrists set up a working party to (a) enquire into reports made by adults, usually but not exclusively arising within a therapeutic relationship, of recovered memories of long-forgotten childhood sexual abuse, and (b) to

provide guidance for British psychiatrists in this difficult area. The working party submitted its report in the summer of 1996. For a number of reasons the College eventually decided not to publish the report under its imprimatur and instead agreed to the publication of consensus recommendations for good practice (Royal College of Psychiatrists' Working Group on Reported Recovered Memories of Child Sexual Abuse, 1997). The presentt paper is a revised version of the report originally submitted to the Royal College of Psychiatrists.

CONTEXT OF CHILD SEXUAL ABUSE

Sexual abuse of children is a relatively common experience that has probably always existed in all times, social groups and cultures. However, the full extent of sexual abuse and incest has become widely known only in recent years, in part through the influence of the women's movement. Freud's theory of the Oedipus complex led to a belief among some professionals and others that girls harboured sexual desires for their fathers and that adult women 'Unconsciously' wished to be raped and were incapable of telling fact from fantasy. Often, children and adult women who were abusedsed remained silent and those who did tell were often not believed or, worse, were blamed for what had happened.

Creation of the Working Party

There is no doubt that childhood sexual abuse is widespread, distressing and harmful; the true extent of the problem is uncertain. Official statistics almost certainly underestimate the phenomenon, as many cases may never come to light, while some independent surveys may over-estimate it. Problems with the definition of sexual abuse and lack of firm corroborative evidence make it difficult to compare studies (Browne & Finkelhor, 1986; Beitchman *et al,* 1991, 1992; Kelly *et al,* 1991; Mullen *et al,* 1994; Cicchetti & Toth, 1995; Halperin *et al, 1996).*

Legally and morally there is no such thing as consensual sex between a child and an adult. Such abuse often has a distorting effect on personal development and later relationships.

When numbers of women and children began, in the early 1970s, to speak out, they had no trouble in remembering what had memories of long-forgotten childhood sexual abuse, and (b) to provide guidance for British psychiatrists in this difficult area. The been done to them. Their trouble lay in not being able to forget. In the 1980s, at first in the USA and spreading in the early 1990s to

the UK, came reports of a new phenomenon. Adult women, and some men, during counselling or psychotherapy, reported recovering apparent 'memories' of previously unknown childhood sexual abuse. Many of them made accusations against elderly parents, and harrowing accounts of family disruption resulting from such accusations have been published. In the USA a number of prosecutions for sexual offences and at least one for murder were based upon evidence 'recovered' in this way. Now, however, some patients have retracted their 'memories' and they or those whom they accused have successfully sued the therapists involved for implanting 'false memories'.

The furore has caught the public imagination and the debate has been mainly carried out in the public arena, with newspaper and magazine articles, radio and television shows in addition to a flood of popular books. For several years, meetings of the American Psychiatric Association provided an arena for bitter disputes between professional protagonists of different beliefs. The controversy has been admirably reviewed by Crews (1997).

Accused families have formed themselves into societies to proclaim their innocence, raise awareness of a new problem and promote research and education. More than 18,000 families have sought information from the False Memory Syndrome Foundation (FMSF) established in Philadelphia in 1992. False memory societies have since been formed in Australia, Canada, The Netherlands, New Zealand, Sweden, Israel and the UK. The British False Memory Society (BFMS), founded in 1993, has received requests for information from nearly 900 families.

Gudjonsson (1997a,b) undertook a questionnaire study of accused families who were members of the BFMS and reported that 87% of accusers were female. Only 3% of accusations were made against stepfathers and 50% were made against biological fathers. This contrasts sharply with abuse reported in childhood, in which srepfathers were more likely to be accused (Russell, 1983; Kelly *et al*, 1991). Gudjonsson (1997b) also noted that recovered-memory abuse was reported to start at a much younger age (childhood and infancy) than never-forgotten abuse, which typically occurs in preadolescent children or in early adolescence. Accusations were usually non-specific and had arisen primarily within the context of a therapeutic relationship. Depression, followed by eating disorder, were the most common reasons for seeking therapy. Significant relationship problems was the common stress factor prior to the accusations being made and it is interesting to note that most of the accusations had been made in the previous six years.

In a further study (Gudjonsson, 1997c) of 37 cases in which criminal proceedings were reported, 23 of the alleged perpetrators were charged by the police. Three prosecutions were subsequently discontinued by the Crown Prosecution Service, 20 went to court and in eight there was a conviction and lengthy prison sentence. Five of the successful prosecutions did not involve recovered memories.

Many professional associations have offered guidance to their members (American Psychiatric Association, 1993; American Psychological Association, 1994; American Medical Association, 1994; Australian Psychological Society, 1994; Canadian Psychiatric Association, 1996). In their efforts to remain impartial they have failed to resolve the impasse between research and clinical observation. Only the Australian Psychological Association has given clear and unequivocal guidance, which criticises some practices and beliefs of clinicians. The British Psychological Society produced its report on this phenomenon in January 1995 but there was a poor response rate to their questionnaire and strong criticism of their analysis of the problem (Weiskrantz, 1995).

In May 1995 the Royal College of Psychiatrists Working Group on Reported Recovered Memories of Child Sexual Abuse was set up to examine:

(a) current views on the psychology of memory;
(b) current beliefs and practices on the recovery in adult life of previously forgotten memories of childhood sexual abuse;
(c) the effectiveness of memory enhancement techniques;
(d) the validity of memories of long forgotten childhood sexual abuse;
(e) the consequences of memory recovery; and
(f) the distinction between true and illusory memory.

On the basis of findings in these areas, the Working Group would then recommend guidelines for good and acceptable practice in this area.

A survey of College members was carried out in an attempt to discover how widespread particular beliefs and practices are among members. This failed to achieve a response rate sufficient to justify a full analysis.[1]

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1. The survey of College members generated a 29% response rate (n=933) and any results must be treated with caution. Of those who responded, as many as one in five had attempted to recover memories of forgotten sexual abuse, one in six accepted the use of check lists as diagnostic of repressed sexual abuse and one in ten recommended the book *The Courage to Heal* (Bass & Davis, 1988) to their patients.

DEFINITIONS

Recovered memory

A recovered memory, in the context of this paper, is the emergence of an apparent recollection of childhood sexual abuse of which the individual had no previous knowledge.

An individual who had always had a memory of sexual abuse, but who chose not to think or talk about it, is excluded by this definition, as are memories of nonsexual events. Reports of childhood abuse which had never been forgotten, and reports by children of current abuse are also excluded. We were concerned exclusively with adults, often in their 30s and 40s, who reported memories of child sexual abuse after decades in which no such suspicion had been raised and of which they had no prior memory. 'Recovery' of memory should be distinguished from 'retrieval' of memory by active recall or simple 'remembering', which are normal, everyday occurrences.

False memory

A false memory is the recollection of an event which did not occur but which the individual subsequently strongly believes (also called pseudo-memory or illusory memory).

False memory syndrome

False memory syndrome (FMS) after Kihlstrom (1998) is:

"...a condition in which a person's identity and interpersonal relationships are centered around a memory of a traumatic experience which is objectively false but in which the person strongly believes. The memory often rules the individual's entire personality and lifestyle, and disrupts all sorts of other adaptive behaviors. The memory tends to take on a life of its own, encapsulated and resistant to correction. The individual avoids confrontation with any evidence that might challenge the memory and may be effectively distracted from coping with the real problems of living"

Thus, FMS is more than a simple recollection of a forgotten event, or even of a disputed event. It entails major disruption of the personality and family relationships.

Repression

A Freudian concept, repression, is said to occur when a memory is actively kept out of consciousness because it is unacceptable to the conscious mind, to which its admission would generate anxiety. 'Robust repression' allegedly permits individuals to lose all recollection of major life events, extremely long series' of traumatic events, and immensely complicated patterns of social behaviour (Herman, 1992; Ofshe Watters, 1994).

NATURE OF THE PROBLEM: FALSE MEMORY SYNDROME

The term 'false memory syndrome' arose as popular shorthand to describe the 'recovery' in adult life of apparent memories of having been sexually abused in childhood. 'Memories' usually, but not always, occur during the course of therapy undertaken for a range of psychological issues.

In a stereotypical example, a patient who presents with a variety of psychological symptoms but with no history of having been abused may be explicitly informed that the symptoms are due to forgotten sexual abuse and be actively encouraged to remember the abuse. The patient, usually female, is encouraged to search for possible memories, and to read popular literature describing recovered memory and sexual abuse. In extreme cases even to assume that she has been sexually abused. One woman reported:

> "I would walk around saying 'my family abused me.' I had to say it a lot to really believe it. My first year and a half was spent just accepting the fact that I had been abused." (Frederickson, 1992)

Eventually the patient accuses a parent, or other person, and frequently severs all contact with the accused, and other family members who disbelieve the allegations. In many cases personal injury litigation or criminal prosecution of the accused have followed.

Not all cases of false memory arise from therapeutic practice. Increasingly the request for 'memory recovery therapy' is initiated by a client who has read one of a number of self-help books. *The Courage to Heal* (Bass & Davis, 1988) promulgates the view that forgotten sexual abuse lies at the root of almost all adult psychiatric problems and that unless it is brought fully into consciousness treatment will prove ineffective. The very inability to

inability to recall abuse is taken as a sign that abuse has occurred but is being 'denied' through the process of repression. The therapist and patient embark together upon the process of recovering hidden memories. This approach is supported by the existence of check-lists of symptoms that these therapists believe to be indicative of repressed sexual abuse.

The therapist will generally refuse to meet other family members and it is rare for a collateral history to be obtained. Rather, the therapist may assert that to seek objective evidence to substantiate the accusations would be a betrayal of the patient's trust. Some, however, join the patient in confrontation of the alleged abuser before links with the family are severed.

THE PSYCHOLOGY OF MEMORY

It is popularly believed that memory operates as a video recorder with events being recorded and srored, awaiting recovery essentially as they were laid down.

Memory is, however, a much more complex and less efficient process. Bartlett (1932) showed that biographical memory is essentially a reconstructive process in which only some elements of past experiences are stored and are retrievable. Far from being recovered unchanged, he demonstrated that memories may be reconstructed and elaborated by all kinds of subsequent influences.

Episodic memory

Episodic memory is the system associated most closely with traditional approaches to learning and memory and is that most readily disrupted by brain damage. It is normally associated with awareness of the learning process and strongly influenced by the degree of concentration and organisation.

Autobiographical memory

Memory is known to be fallible, altered by the passage of time and subject to error and distortion. Two interacting components, personal memories and autobiographical facts, are described. Individual autobiographical memory is unreliable; people will sometimes have startlingly accurate memories of some events yet be unable to remember considerable parts of their past experiences. Newly acquired facts may alter personal memories through reorganisation, reappraisal and revision. Autobiographical

memory develops over the pre-school years and becomes more detailed with age (Hudson & Nelson, 1986; Pillemet & White, 1989). It becomes enriched through social construction (Nelson, 1993) and through active reinterpretation of experiences while remembering (Neisser & Harsch, 1992). However, confidence in one's memory does not correlate with the accuracy of the memory, nor does the detail involved in the memory or its emotional strength give any indication of its accuracy.

Few people seem able to remember events which took place before about the age of three years. This 'infantile amnesia' (Campbell & Spear, 1972; Campbell *et al*, 1974; Coulter *et al*, 1976) depends upon delayed integration of the brain, which has been demonstrated in other species of mammal. Episodic memory does not develop until after age four years and most people have limited memories before about five or six years of age (Hudson & Nelson, 1986).

Implicit memory

This term includes behavioural, emotional and perceptual learning due to a past experience but not involving a sense of conscious recollection when retrieved.

Baddeley (1993) argues that implicit memory is a cluster of learning systems independent of episodic memory. Episodic memory is characterised by the capacity to associate previously unrelated events in a single trial, to associate an event with a context and hence locate it in time and place. This, stated simply, is memory for events including autobiographical experiences. In contrast, implicit memory systems are specialised for accumulating information from the world but are incapable of keeping separate the individual episodes.

Pillemer & White (1989) similarly postulate a dual memory system with a conditioned-emotional memory expressed through feelings, behaviour and images; and a narrative-autobiographical memory, which emerges around four to five years of age and is accessible by intentional retrieval.

Memories of trauma

Numerous studies in children (Terr, 1983; Malmquist, 1986; Pynoos & Nader, 1989) and adults (Leopold & Dillon, 1963) have shown that psychologically traumatic events are vividly though not always accurately recalled and are frequently followed by intrusive recollections in one form or another. The problem following most forms of trauma is an inability to forget, rather than a complete

expulsion from awareness, and amnesia for violent events is rare.

Psychogenic amnesia following psychological trauma in adults is associated with sudden onset, temporary loss of personal information and usually total amnesia of the particular trauma. In contrast to so-called repressed or dissociated memory, patients with this form of amnesia are well aware of the gap in their memory. (Loftus & Ketcham, 1994; Kopelman, 1996). Some workers have suggested (Terr, 1991; Herman, 1992; van der Kolk & Fisler, 1995) that memories of repeated sexual abuse are laid down in the brain through a unique process which does not apply to other forms of trauma and which results in total loss of awareness both of the trauma and also of the amnesia. They argue further that the emotional component of a traumatic event can be stored as an implicit memory, even while the terror of the event prevents its being recorded as an explicit memory trace. These memories, they claim, may then return via the sensori-motor system as context-free, meaningless, kinesthetic sensations, smells, tastes or visual things, often marked by intense emotional reactions. This remains an unproven hypothesis.

This hypothesis has nevertheless given rise to the popular belief in so-called 'body memories'. Proponents of this view believe that memories are recorded in cellular DNA and that if the mind forgets, the body will remember (van der Kolk, 1994). There is no empirical evidence to support this notion (Smith. 1995).

There is no evidence that an implicit memory can be translated into autobiographical memory. Links which emerge in therapy or personal introspection between an implicit memory and explicit autobiographical memory need to be recognised as constructions or creations of the mind.

It has not been possible to demonstrate any clear link between clinical accounts of trauma, and the neurobiology of memory. Nor is it clear why sexual trauma alone should behave in a special manner. Hartmann (1984) also notes that solid evidence exists that implicit memories are found in people who have not suffered trauma.

Suggestion and memory

A growing body of research indicates that partially or completely inaccurate memories are not uncommon. Memory is vulnerable to suggestion. Implanted false stories can be 'adopted' and subsequently 'remembered' as actually experienced events.

Those recollections are vivid and subjectively indistinguishable

from recollections of actual events (Johnson & Suengas, 1989; Ceci & Bruck, 1993; Loftus, 1993). 'Flashbulb' memories of critical moments such as the loss of the *Challenger* or the assassination of Kennedy have been shown to be completely unreliable but held with absolute certainty. (Neisser & Harsch, 1992). Suggestibility and confabulation increase with the length of time between the event and later attempts to recall it. Repeated questioning over time and the authority of the questioner also heighten suggestibility.

Children

Recollections of childhood events are particularly vulnerable to misleading suggestions and distortions. Evidence suggests that children who *spontaneously* report current or recent abuse are usually telling the truth. Nevertheless, young, non-traumatised children may confabulate as Ceci & Bruck (1993) have demonstrated. They highlighted the dangers of repeated interviewing of children who produce stories of abuse to please the interviewer and come to believe their own imaginings. Where a report is made in circumstances of undue influence, caution in the interpretation of children's accounts is required. This applies, for example, when contentious divorce or marital separation proceedings are in progress or where other accusations have been brought within the family on the basis of newly recovered memories.

Conclusion

Memory is constructive and reconstructive rather than reproductive. It is fallible, altered by the passage of time and subject to error and distortion. Individual autobiographical memory is unreliable and people are often unable to remember considerable parts of their past experiences. Experiments have shown that expectations and beliefs can colour people's recollections, and that gaps in memory will be filled to create a satisfying narrative. Confidence in one's memory does not correlate with the accuracy of the memory (for a comprehensive review of the literature see Lindsay & Read, 1994). No autobiographical memory can be relied upon without some external corroboration but the frequent denial, even by proven abusers, and the secrecy surrounding child abuse often make such corroboration difficult to obtain.

BELIEFS AND PRACTICES IN THE RECOVERY OF MEMORIES OF CHILD SEXUAL ABUSE

A number of reviews have reached the conclusion that childhood sexual abuse can have long-term sequelae but that not all abused children are harmed. A significant proportion of adults who were unequivocally abused in childhood have made good adjustments and are symptom-free (Constantine, 1981; Browne & Finkelhor, 1986; Beichtman *et al*, 1992; Kendall-Tackett *et al*, 1992). The long-term effects of abuse appear to be largely non-specific. The is no pathognomic post-abuse syndrome.

Despite popular belief, empirical evidence linking childhood sexual abuse with bulimia nervosa is sparse (Pope & Hudson, 1992). A recent paper by Wonderlich *et al* (1996) provides some evidence of an association between the two but does not support a causal link (Pope, 1997). At present all that can be said is that childhood sexual abuse is a vulnerability factor for psychiatric disorder in general but for no condition in particular (Romans *et al*, 1995; Vize & Cooper, 1995).

Recovered memory therapy

Although there has been discussion of the significance of purportedly repressed or otherwise lost memories for nearly 100 years, there is still little agreement on the mechanisms of any loss or the effect that such lost memories may have upon psychological well-being. There is equal uncertainty on the effects of the recovery of previously lost memories.

Recovered memory therapy is not a single or unified therapy, nor is it an officially designated treatment. It is a label to describe the practices of a heterogeneous group of clinicians who share a particular set of beliefs (Yapko, 1994). They accept as a basic proposition that present symptoms are caused by past traumatic sexual abuse and that the memory of these events has been lost to consciousness. The second proposition they accept is that this lost material can be recovered and that the recovery of these memories is essential to the remediation of a patient's symptoms. Neither of these propositions have been proven.

Psychiatrists are as likely inadvertently to be practising 'recovered memory therapy' as non-psychiatrists if they accept these propositions. Surveys of the membership of the FMSF and the BFMS have shown that a significant proportion of disputed and probably false allegations arise from treatment by mainstream health care professionals.

It is important to be aware that memory recovery is not confined to any particular therapeutic approaches. It may equally occur in any form of talking therapy, from long-term psychotherapy to brief biologically-based interventions. It may arise from any intervention coloured by similar beliefs about the cause of psychological distress. Television programmes, popular self-help books, talking to individuals or groups who are convinced that repressed memories of childhood sexual abuse are responsible for many, if not most, adult ills may act as triggers or 'flashbacks' to generate false memories.

TECHNIQUES EMPLOYED TO ENHANCE MEMORY RECOVERY

In the service of uncovering 'forgotten' traumatic events some therapists use a number of techniques to enhance the recovery of lost memories. Some of these are regularly in use in orthodox therapy but are questionable when used as 'memory recovery' procedures (Yapko, 1994).

Check-lists

These derive both from professional literature and from popular self-help books. Foremost in the field, *The Courage to Heal* (Bass & Davis, 1988) encourages the irresponsible views that: "Many women who were abused don't have memories, and some never get any. This doesn't mean they weren't abused", and "if you think you were abused, and your life shows the symptoms, then you were".

Secret Survivors (Blume, 1990) includes in a list of symptoms of sexual abuse: "depression, phobias, eating disorders, low self-esteem, fear of the dark, nightmares, headaches, gastrointestinal disorders, gynaecological problems, wearing baggy clothes, drug or alcohol abuse or total abstinence, sexual aversion or sexual promiscuity". Many of the symptom checklists are so all embracing that few people would be excluded. One article (Bradshaw, 1992) advises:

"if you identify with five *or more* [symptoms), yet have no memory of incest, you might try an exercise. Accept the theory that you were absed, live cautiously with the idea for six months, in context with an awareness of the traits you acknowledge. and see whether any come to you."

Several authors emphasise the use of prolonged or repeated interviews in efforts to secure the patient's acceptance that they were abused despite their continuing rejection of the idea. This may be associated with statements such as "You were abused even if you have no memory of it". Thus, direct leading questions are standard techniques for some 'recovered memory therapists' (Maltz & Holman, 1986; Bass & Davis, 1988; Frederickson, 1992) and some patients report coercive interrogation rather than interview.

There is no evidence that any checklists, syndrome, symptoms or signs indicate with any degree of reliability that an individual has in the remote past been sexually abused.

Drug-induced abreaction or drug-mediated interview

During the First World War some physicians observed that abreaction under hypnosis was effective in relieving symptoms following traumatic combat experiences in soldiers (Culpin. 1920; Freud *et al,* 1921).

Blackwenna (1923) may have been the first to use barbiturates as a means of therapeutic narcosis. Lindeman (1923) demonstrated that small doses of sodium amytal injected intravenously produced a sense of serenity and well-being with some disinhibition, which enabled some to speak easily of intimate thoughts and experiences.

After Dunkerque, Mallinson (1940) and Sargant & Slater (1940) reported the effectiveness of abreactive treatment using intravenous barbiturates in achieving rapid resolution of hysterical symptoms associated with what they referred to as 'a repressed trauma'.

These and similar observations led to the myth of intravenous sodium pentothal (a barbiturate) as the 'truth drug' but these ideas were quickly discredited. Sargant & Slater (1944) acquired by far the widest experience of abreactive techniques and they wrote:

"Often the doctor would be told fantastic stories under the drug straight from the world of nightmare. The falsity of these wou1d be apparerent on the surface. But it may also be that he will be told quite plausible and circumstantial stories which are no less the product of dream fabrication. Truth and fantasy will have to be sifted when the patient is in a state of clear consciousness, events seen in reasonable perspective and. shorn of exaggerated affect, integrated with the rest of the patient's experiences. A cautious and sceptical attitude on the part of the doctor will save him from

swallowing all of his patient's hocum, hunting Snarks and exploring nightmares nests".

Although single drug-induced abreaction may be of value where it is known that a traumatic event has occurred, it is inappropriate to use repeated abreaction to 'trawl' for traumatic events. There is a good deal of anecdotal clinical evidence that in repeated sessions, patients will eventually produce material that is often a product of fantasy, and even in a single session great caution is required.

Case report

One of us (S B.) was asked to see an otherwise healthy middle-aged man who presented to a neurology unit with severe pain and 'locking' of his back. Extensive investigation failed to produce an explanation and a psychiatric view was sought. The man denied any current problems and asserted that his job and marriage were unusually trouble free. He was somewhat evasive about his earlier history and claimed to have a memory gap of several years. Pentothal abreaction was attempted and was 'dramatically successful' in that he recounted a period of sustained terror as he and his small Royal Air Force wireless section retreated in Burma and found themselves behind the Japanese lines. He was on solitary guard duty as they continued to move towards the British lines when he dropped off into an exhausted sleep. He suddenly awoke behind a bush to see all of his companions being bayoneted by the Japanese. He tried to cry out but had no voice and when he tried to stand up his back locked. Subsequently he wandered in the jungle until found by a patrol and was evacuated to India.

This provided an adequate psychopathology, including survivor guilt. Unfortunately when this explanation was offered to his wife she pointed out that he had never served in the Royal Air Force. He had enlisted in the army but was discharged as unsuitable during his basic training. He had never been out of England.

Hypnosis

McConkey & Sheehan (1995), in personal research and in their comprehensive review of the literature, clearly demonstrated the unreliability of hypnosis as a means of eliciting memories of past events. Memories recalled under hypnosis are recognised to be

so unreliable that they are no longer admitted as legal testimony. Hypnotic recall increases the confidence with which the memory is held while reducing its reliability.

The dominant role of the hypnotist and the passivity of the subject create a situation in which the hypnotist may, intentionally or otherwise, influence the subject in creating or modifying memories. Where the relationship with the hypnotist is established over a number of sessions or where the situation itself is one creating clear expectations, for example in a forensic setting, the possibility of distortion is increased. A major difficulty also exists in determining whether the individual is in a true hypnotic trance or is manipulating the situation for reasons of which the subject or therapist may not be completely aware. The creation under hypnosis of memories of previous lives, often as distinguished historical subjects, or of abduction by aliens (Mack, 1994) and sexual abuse in space ships reveal the extent to which this technique is suspect. Of concern is the extent to which people who elicit and report such memories appear to believe them despite their quasi-delusional nature.

Age regression

Age regression (usually but not always with the use of hypnosis) is undertaken both in a search for forgotten abuse and as part of the cure. The patient is encouraged to regress to an age at which abuse is thought to have occurred in order that, through both remembering and reliving the experience, some resolution and healing will take place. 'Body memories' and flashbacks, among other things, provide the cue to seek for abuse via age regression.

Accounts are at times so fantastic that they are beyond belief and there is no evidence of the efficacy of this technique. Nor is there evidence that the subject's memories or cognitions do indeed 'regress' to the target age.

Dream interpretation

Dream interpretation is used to infer previous sexual abuse through the interpretation of symbols and nightmares. There is no evidence that dreams are a 'royal road' to historical accuracy and interpretations usually reflect the training and personal convictions of the therapist.

It is frequently observed that patients dream to fit the theoretical model of their therapist. Since dreams are generally agreed to

contain a residue of the day's events, it is at least plausible that, if the day is spent in an attempt to prove or disprove previous sexual abuse, one's dreams may come to reflect that preoccupation.

Imagistic work, 'feelings work' and art therapy

Imagistic work, guided imagery and guided fantasy involve the creation of images, often minutely detailed, by a variety of introspective techniques sometimes amounting to self-hypnosis. Similar criticisms apply to the practice of journaling and creative writing in which, in a state of reverie amounting to trance, subjects are encouraged to write down their thoughts in a flow of consciousness. One girl describes herself as writing questions with her right hand to which her 'inner child' replied to in a childlike scrawl with her left hand (Brewer, 1991; Frederickson, 1992).

'Feelings work' is similar in that the patient is encouraged to recognise feelings of distress and consider how these might reflect past abuse. This is pure suggestion.

Art therapy may be used in a manner similar to dream and imagistic work with the emphasis on searching for complete and detailed memories of past abuse. Again, there is no valid basis for this belief.

Many of these techniques are applications of accepted clinical practice. The beliefs of the therapist are the determining factors in how a patient's productions are shaped. These approaches provide a rich backdrop for projection and fantasy elaboration. The encouragement of reverie and imagery of various kinds readily produces trance-like states. Practitioners who aver that they do not use hypnosis may nevertheless be doing so unwittingly since some of these techniques are powerfully suggestive and induce trance-like states.

Survivors' groups

Survivors' groups are often supportive, helpful in restoring self-esteem and in reducing shame and isolation (Herman, 1987). However, the practice of mixing those who clearly remember abuse with those who are suspected by the therapist of having repressed their memories of abuse (Herman & Schatzow, 1987) has been strongly criticised (Ofshe & Watters, 1994; Pope & Hudson, 1995; Pendergrast, 1995) because of the risk of suggestion and contagion among group members.

Conclusion

Evidence does not support the view that memory enhancement techniques actually enhance memory. There is evidence to *support the view that these are powerful* and dangerous methods of persuasion. Many of the memories 'recovered' using these measures refer to events in the early months or years of life which fall within the period of infantile amnesia and must be regarded as implausible for that reason. There is sufficient evidence of distortion and/or elaboration of memories to assert that entirely new and false memories can he created, not only experimentally but also in clinical practice. The evidence suggests that this is true of all of the techniques we have described above.

CAN REPEATED, SEVERE CHILDHOOD SEXUAL ABUSE BE FORGOTTEN?

Repression and dissociation

Trauma (recovered memory) theory postulates that forgotten trauma lies at the root of adult psychopathology and must be remembered for healing to occur. This approach harks back to early theories of Janet (1907) and Freud (Breuer & Freud, 1893; Freud, 1893, 1896). Janet (van der Kolk & van der Hart, 1989) postulated a vertical 'split' in the psyche whereby traumatic memories were kept apart, 'dissociated' or disconnected, from normal consciousness. This *condition seconde* became the basis for present-day theories of dissociation and multiple personality disorder or dissociative identity disorder. It is of interest that at the end of his life Janet turned his back on the *condition seconde* (Hacking, 1995), believing it to be an extreme and unusual form of manic depressive disorder.

Freud outlined an active process of defence against painful wishes, thoughts and memories via repression which prohibited access to conscious awareness. It was the repression from awareness of psychic trauma and, specifically, childhood sexual abuse which was believed by Freud to be the cause of adult neurosis.

As is well known, Freud later repudiated his early theory of incest in the aetiology of hysteria.

In recent years repression has been taken over and developed beyond Freud's original theory. The concept of 'robust repression' holds that repeated episodes of severe sexual abuse can be dismissed from memory almost as soon as they occur.

Proponents claim that each event is forgotten as it happens and that repeated assaults are experienced as if for the first time. This capacity to 'block out' memory permits the child to present a placid and unremarkable facade during the childhood years, so that no-one, including the child, is conscious of anything untoward until decades later when the memories come back during therapy. This is very far removed from the traditional psychoananalytic understanding of repression, although there are a few American psychoanalysts who appear to subscribe to these beliefs (Herman, 1992; Davies & Frawley, 1994). Some cite in support Summit (1983) who described the 'child abuse accommodation syndrome' in which under social pressure children tend to withdraw and deny their accusations; however, he did not contend that the memory was obliterated.

Dissociation is the mechanism put forward to account for this unlikely scenario. In extreme cases the dissociation is said to lead to fragmentation and the creation of alternative personalities. This is the basis of multiple personality disorder in which it is believed that multiple 'alter' personalities exist within an individual, usually without knowledge of each other. The frequency with which this condition is diagnosed has increased 10-fold in the USA and it is beginning to be diagnosed more frequently in the UK. Slater & Roth (1969) stated unequivocally: "It seems that these multiple personalities are always artificial productions, the product of the medical attention that they arouse". Many specialists still doubt the existence of multiple personality disorder as a distinctive psychiatric condition and consider it to be iatrogenic in origin (Piper, 1994; Merskey, 1995). It does appear that diagnoses cluster in a few specialist clinics and this suggests that bias may be operating in referral or practice. Video-tapes and clinical demonstrations of the condition suggest that it arises in suggestible individuals as a consequence of the expectations of the therapist. As in hypnotic states, it is not easy to differentiate between involuntary and simulated states. There is evidence that attention (particularly from therapists perpetuates the dissociation and leads to the creation of ever more 'alter personalities' (Merskey, *1995).*

'Robust repression' is said to account for recovered memories of ritual satanic abuse, cannibalism, ritual murder and other disturbing events generally thought unlikely to be forgotten. In the USA 18% of recovered memories known to the FMSF are of this sort. The figure from a survey of BFMS families conducted by Gudjonsson (1977b) is that 8% of these British families report accounts of satanic abuse. Some therapists believe that abduction

and sexual abuse by aliens occurs in reality (Mack, 1994), while others are sincerely convinced that Satanic abuse occurs (Sinason, 1994). Extensive investigations by the Federal Bureau of Investigation in the USA and by the police in Britain have failed to find evidence of such practices. We accept the conclusions of a study commissioned by the Department of Health (La Fontaine, 1994) which found no evidence to support a satanic conspiracy of cult activity, although three isolated cases of abuse including ritual elements were verified. It is clear that sex abuse rings do exist and some abusers may use ritual to terrorise and coerce their victims (La Fontaine, 1998).

Evidence for repression

Despite widespread clinical support and popular belief that memories can be 'blocked out' by the mind, no empirical evidence exists to support either repression or dissociation. Three often-quoted studies (Herman & Schatzow, 1987; Briere & Conte, 1993; Williams, 1994) which, at first sight, appear to lend some support to the theory of repression of memories of early sexual abuse, have been severely criticised (Ofshe & Watters, 1994; Pendergrast, 1996; Pope, 1997) and are all capable of alternative and equally plausible explanations. In a review of Janet's theories, van der Kolk & van der Hart (1989), who espouses trauma and repression, admits that we know no more now than we did 100 years ago about the biology of the mind.

Pope & Hudson (1995) required that to demonstrate the existence of repression a research study must confirm first, that the sexual abuse had initially occurred and that confirmation should be verified by the experimenter who should not rely on self-report; and second, that the individual actually developed amnesia of a nonLiological nature, after the age of five years old, which exceeds ordinary forgetting. Cases of amnesia due to biological causes such as brain injury or intoxication and those due to infantile amnesia must be excluded.

Herman & Schatzow (1987), in a short-term group programme for incest survivors, treated 53 women, whom they believed had been abused, with the goal of recovering memories of abuse. Before joining the group all patients reported either sexual abuse by a relative or a strong suspicion of abuse but no actual memory of the events. Alleged abuse ranged from indecent exposure and propositions to sexual intercourse. The women were divided into three groups on the basis of the type of amnesia they described. 'Severe amnesia' was defined as having no memory of abuse

before entering therapy, 'partial amnesia' as having some memories with further ones emerging during therapy, and 'no amnesia' as those where memory was always present and no new memories emerged during treatment. 'Severe amnesia', reported by 26% of the women, was correlated with memories of earlier and more violent abuse. The authors argue that this represents true (massive) repression, in which the more severe the trauma, the more complete the memory loss. However, the mean age of abuse is 4.9 years and in many of the women, abuse, if it took place, had occurred within the period of normal infantile amnesia, from which 'recovery' is improbable. Fewer than half of the 53 women obtained confirmation, and of those who did, the age of onset, degree of amnesia for the event of severity of abuse are not specified. Those women who were able to find corroboration may have been those who did not forget, or had only partial amnesia. From the evidence presented in the paper it is likely that the more extreme memories reported were confabulations.

Briere & Conte (1993) gave a questionnaire to a clinical sample of patients in therapy who reported they had been sexually abused in childhood; 59% of 450 subjects reported periods of amnesia for the abuse before the age of 18 years. It is not clear how many of the alleged abuse events were confirmed. More importantly the amnesia is assessed solely on the basis of a single question: "During the period of time between when the first forced sexual experience happened and your 18th birthday was there ever a time when you could not remember the forced sexual experience?" The subjects were not asked further questions to distinguish between those who gave no thought to the abuse, those who attempted to minimise the event, and those who had truly forgotten it. Nor is it certain how many patients were reporting abuse sufficiently severe that they would reasonably be expected to remember it. Moreover, these subjects were in treatment with therapists who formed part of a sexual abuse network of referral. It is not known whether the therapists were committed to recovered memory therapy or whether the patients themselves had expectations based on such beliefs. Thus, the influence of the therapy itself is uncertain.

Femina *et al* (1990) and Williams (1994) studied individuals with documented evidence of childhood abuse followed up in adult life and found that they were not invariably able to report those experiences more than a decade later. Williams interviewed 129 women, who as children had been known to the authorities for sexual abuse, ranging from touching to intercourse, 17 years after the event. Three women had to be excluded from the study

because they admitted that the original abuse had been faked. The age of the women at the time of the abuse ranged from 10 months to 12 years and at interview they were aged 18-31. Over an extended interview in which they were asked detailed questions about their sexual histories, 38% failed to report the documented episode of sexual abuse. Williams concludes that this represents repression of the event. However, while the documented episode was not always reported, the general experience of abuse was, and the majority had no amnesia (62% reported the index event and 88% a history of some form of sexual abuse). It is not clear how many of those who did not report abuse would have been older than five years at the time, nor how many were trivial events that might reasonably have been forgotten. However, there were undoubtedly some cases of severe abuse which was not reported 17 years later. Perhaps the abuse had been forgotten, but the following study suggests another possible explanation.

Femina *et al* (1990) interviewed adults (mean age 24) with a documented history of physical abuse in adolescence; 38% (18 individuals) failed to report the index event (the same proportion as in the Williams (1994) study). Femina then performed a second interview with eight from that subgroup, in which they were told of their abuse. All eight admitted that they did remember the event and had withheld the information. Reasons presented included embarrassment, a wish to forget the past, to protect their parents or lack of rapport with the interviewer.

Williams (1994) did not conduct a second interview and it is premature to conclude that her subjects actually had amnesia for the event when a similar study found no amnesia. (For a detailed critique of these papers see Lindsay & Read, 1994; Ofshe & Waiters, 1994; Pope & Hudson, 1995; Pendergrast, 1996.) What the Williams study does show is that childhood sexual abuse is significantly underreported. Research evidence also shows that under-reporting of other significant events in childhood, such as hospital admissions or accidents, is common (Pope & Hudson, 1995) and this accords with clinical experience.

A number of further studies have attempted to look at the forgetting and recovery of memory of sexual abuse (Feldman-Summers &, Pope 1994; Andrews *et al,* 1995). None of them meets Pope & Hudson's (1995) stringent criteria for an acceptable study. Most are accounts arisirig during therapy, most researchers fail to confirm the factual basis of abuse. They rely upon self-reports or unverified reports from third parties, for instance where a patient tells the therapist that her sister has proof that the abuse

occurred but the therapist does not check it. They fail to indicate the severity of the forgotten abuse or whether extraordinary means, such as hypnosis or regression therapy, are needed to needed to recover the memory, and whether mechanisms such as 'massive repression' must be invoked to explain it having been forgotten.

Conclusions

Individuals regularly remember long-forgotten events but it does not follow that repression of these memories had occurred. Some of these are accurate memories of actual events, but often they are elaborated, distributed or even invented by processes involving recall and reminder by others.

It is possible that the memory of events that are associated with anxiety or discomfort are suppressed or pushed to the back of the mind but remain accessible. Some painful memories of trauma are never forgotten but by an act of will the individual avoids thinking and talking about them.

Some 'recovered memories' may be elaborated recollections of real events which may or may not have been abusive. Abuse which was relatively minor may be forgotten and sometimes later remembered. Other episodes are forgotten if they were not perceived as abusive at the time, and may be recalled when their significance is recognised. There is no evidence to support the wholesale forgetting of repeated experiences of abuse, nor of single episodes of brutality or sadistic assault, apart from the normal experience of infantile amnesia. False memories can and do occur (Loftus & Ketcham, 1994) and some memories are so incredible that most clinicians would regard them as evidently false.

No evidence exists for the repression and recovery of verified, severely traumatic events, and their role in symptom formation has yet to be proved. There is also a striking absence in the literature of well corroborated cases of such repressed memories recovered through psychotherapy. Given the prevalence of childhood sexual abuse, even if only a small proportion are repressed and only some of them are subsequently recovered, there should be a significant number of corroborated cases. In fact there is none (Pope & Hudson, 1995; Pendergrast, 1996).

THERAPEUTIC OUTCOMES OF MEMORY RECOVERY TREATMENT

Despite the lack of evidence for repression there are many accounts which support the belief that abreaction and verbalisation of painful traumatic memories are clinically effective. Recovery of memories of childhood sexual abuse is said to empower the patient, provide a sense of security and confidence, replace confusion and obscurity with clarity, reverse the sense of isolation and helplessness and relieve guilt (Bass & Davis, 1988; Herman, 1992). There is evidence of the beneficial effect of recall and abreaction following war and natural disasters (Sargant & Slater, 1944; Grinker & Speigel, 1945; Archibald & Tuddenham, 1965; Kolb, 1984). These studies are often inaccurately cited as providing evidence of repression. What they describe is suppression of affect for the event, rather than that the event itself was forgotten. Loftus (1997) reviewed 30 cases selected at random from 670 claims submitted to the Washington Victims Compensation Program. Twenty-six had 'recovered' a memory of abuse through therapy. All 30 were still in therapy after three years, 18 for more than five years. After treatment 20 were suicidal compared with three before treatment began, 11 were hospitalised (c.f. two before treatment), eight engaged in self-mutilation (c.f. one before) and marriage break-up occurred in almost all. It appears that in these cases, recovery and abreaction had serious adverse effects.

Clinical accounts highlight the distress experienced as some patients 'recover memories' or 'relive trauma'. Patients do not always want their 'memories' and some cannot believe them to be true. Some therapists regard this as proof of their inherent reliability, suggesting that patient who cannot face the truth is battling against the processes of denial and repression. It is an equally plausible explanation, however, that the patient is struggling to maintain a hold on reality in the face of powerful suggestive influences. Undoubtedly, there are clinical accounts of 'memories' being recovered with apparent long-term benefit. Unfortunately, they are almost universally uncorroborated by evidence to show that the remembered event actually took place.

Spence (1982) distinguished between narrative truth and historical truth, shifting interest towards establishing the patient's perception of events irrespective of whether the events had really happened. Some clinicians believe, as did Freud, that historical truth is not important to therapy. It may be the case that abreaction of an imagined but believed-in event is effective in relieving

symptoms, and clinical examples of 'reincarnation therapy' have been described. However the effects of such distorted truth should not be overlooked. The damage done to families if the accusations are untrue is immense. Moreover, it is not only families that are damaged by mistakes in this area. Patients who are mistakenly diagnosed as having been abused, frequently end as mental health casualties (Loftus, 1997). Where apparent improvement is based upon a false belief, there seems a serious possibility of further mental distress.

HOW CAN WE DISTINGUISH BETWEEN TRUTH AND ILLUSORY MEMORY?

The common experience of remembering is for a memory to return suddenly and completely. 'Recovered memories' differ from other forms of forgotten and remembered events in being built-up over time. Close examination reveals that they resemble narrative rather than memory, with more being added at each attempt at recall, often becoming increasingly elaborate and bizarre. Accounts of recovered memories may sometimes be vague and imprecise and accusations are often based upon innuendo. It often seems that the key element is a firmly held belief rather than a clear memory. Clues to the probable reliability of a recovered memory lie in the circumstances of the recall, the beliefs of the individual, and any external influences, including memory-enhancing techniques, the suggestive effects of books, media influence and direct suggestion.

Some therapists (Putnam, 1989; Davies & Frawley, 1994) hold that supposed re-enactments in the clinical setting, including feelings arising within the therapist (the countertransference), provide evidence of previously forgotten abuse. While they may be pointers towards characteristic ways in which the patient forms relationships, it is dangerous to extrapolate from these to any statement about past history.

There is no reliable means of distinguishing a true memory from an illusory one other than by external confirmation.

There are, of course, some memories so bizarre or impossible that they are not credible. If something could not happen, it did not happen.

SUMMARY OF THE EVIDENCE

(a) There is no empirical evidence to support either repression or dissociation though there is much clinical

support for these concepts. Evidence does not support the existence of 'robust repression'.

(b) Events are constantly forgotten and remembered on a daily basis.

(c) There is abundant evidence, both clinically and experimentally, that memory can be distorted and that false memories do occur.

(d) Illusory memories can arise during the course of any psychological treatment, whether or not it is designated as 'recovered memory therapy'. Their creation seems to depend upon the conviction of the therapist or the patient that child sexual abuse underlies adult psychopathology.

(e) Memory-enhancing techniques do not improve the quality of remembering. They do increase the conviction with which memories, true or false, are held. They appear to be dangerous methods of persuasion.

(f) More research is needed into the reported associations between childhood sexual abuse and later adult psychopathology. At present we can only conclude that there is no pathognomic Post-sexual abuse syndrome.

(g) There is no means of determining the factual truth or falsity of a recovered memory other than through external evidence, difficult though this is to obtain. Some reported events are so incredible that they could not have occurred and should not be believed.

GENERAL COMMENTS

Psychiatrists have a responsibility not to cause harm to patients or their families and to ensure that members of related health care professions within their teams are properly informed of the vagaries of memory and are adequately supervised.

Any report by an adult of childhood sexual abuse should be listened to seriously and sympathetically. Those who have never forgotten abuse are likely to be reporting a real experience. However, great caution is needed if a memory is reported after years of apparent amnesia. There is considerable evidence that

such memories cannot be relied upon. Therapist and/or patient expectations, reinforced by guided reading, particular techniques and survivors' group participation may distort any existing memory or implant a wholly new one.

There can be no justification for the use of memory recovery techniques which involve significant departure from normal interview or psychotherapy techniques. In particular, consciousness-altering techniques involving drugs, hypnosis, prolonged interrogation or strong suggestion should not be employed as a means of 'recovering' memories whose existence is bypothesised. Memories of satanic abuse or other bizarre events, memories from before the age of four years and memories of repeated abuse over many years forgotten until recovered therapy are not credible. There is a reasonable chance that they will wither away if not reinforced through attention.

Whether a patient who seeks help from a psychiatrist has true or false memories of past sexual abuse, they are entitled to sympathetic and competent care. Good, standard psychiatric practice offers the best prospect of helping a patient to identify and come to terms with past traumatic events.

RECOMMENDATIONS

The following recommendations are particularly concerned with the use of specific memory recovery techniques; however, it is important to emphasise that distortion of memory may occur in any therapeutic situation. Psychiatrists need to be aware of the techniques employed by other members of their teams, including community psychiatric nurses, psychologists and social workers. Any professional, including senior psychiatrists, working with cases of sexual abuse or recovered memories should have access to expert advice and the possibility of regular peer supervision.

These recommendations assume a familiarity with General Medical Council ethical guidelines, particularly with reference to the need for confidentiality.

(a) The welfare of the patient is the primary responsibility of the psychiatrist. Concern for the needs of family members and others may also be necessary, within the constraints imposed by the need for confidentiality.

(b) In children and adolescents symptoms and behaviour patterns may alert the clinician to the possibility of current

sexual abuse but these are no more than pointers for suspicion. Psychiatrists should be aware that there are reported associations but no clear causal connection between childhood sexual abuse and adult psychopathology. The use of check-lists and 'syndromes' as indicators of past sexual abuse are unreliable. Sexual abuse cannot be diagnosed through use of a symptom check-list.

(c) Psychiatrists are advised to avoid engaging in techniques which are intended to reveal evidence of past sexual abuse of which the patient has no memory, and should regard with extreme caution memories of this kind whenever they appear. There is no evidence that the *use of* consciousness-altering techniques, such as drug-mediated interviews or hypnosis, can reveal or elaborate evidence of childhood sexual abuse. Techniques of 'regression therapy' (age regression, guided imagery, 'body memories', journaling, or literal dream interpretation, where this is used as evidence of fact) are of dubious provenance.

(d) Forceful or persuasive interviewing techniques are not acceptable in psychiatric practice. Doctors should be aware that patients are susceptible to subtle suggestions and reinforcements, whether or not these communications are intended.

(e) The psychiatrist should alert the patient to any doubts about the historical accuracy of recovered memories of previously unknown sexual abuse. This is particularly important if the patient intends to take action outside the therapeutic situation. Memories, however emotionally intense and significant to the individual, may not necessarily represent historical truth. Memories may be historically true, metaphorical representations, caused by the psychological state of the patient or be the result of unintentional suggestion by the practitioner.

(f) It may be legitimate not to question the validity of a recovered memory while it remains within the privacy of the consulting room, although this introduces the risk of colluding in the creation of a life history based upon a false belief.

(g) Action taken outside the consulting room, including the revelation of the accusations to any third party, must

depend on circumstances and the wishes of the patient, but the full implications of such action must always be considered. Adults who report previously forgotten childhood abuse may wish to confront the alleged abuser. Such action should not be mandated by the psychiatrist and it is rarely, if ever, justifiable to discourage or forbid the patient from having contact with the alleged abuser or other family members. The psychiatrist should help the patient think through the consequences of any confrontation. In these circumstances it is important to encourage a search for corroborative evidence before any action is taken. The truth or falsity of the underlying memories cannot be known in the absence of such evidence.

(h) Once an accusation is taken outside the consulting room, especially where any question of confrontation or public accusation arises, there is rarely any justification for refusal to allow a member of the therapeutic team to meet family members.

(i) Where an alleged abuser is still in touch with children, serious consideration must be given to informing the appropriate social services. This *must* be done where there are reasonable grounds for believing that the alleged assault took place and that children may still be at risk. The psychiatrist must also be prepared to state clearly whether he or she believes that the grounds for any accusation are unlikely or impossible.

(j) The patient may wish to take legal advice with a view to the prosecution of, or litigation against, the alleged abuser. It is inappropriate to make any decision about this a condition of continuing treatment.

Alongside reports of recovered memories of sexual abuse there have been growing numbers of cases of multiple personality disorder (also known as dissociative identity disorder). There seems little doubt tlat many of these cases are iatrogenically determined. Any spontaneous presentation of multiple personality disorder should be sympathetically considered but should not be made subject of undue attention nor should the patient be encouraged to develop 'alter personalities' in whom to invest aspects of their personality, their fantasies or their current life problems. Psychiatrists should be particularly aware of the

unreliability of the memories reported in these cases and of the close association both with prolonged therapy and with recovered memories of sexual abuse, particularly alleged satanic abuse. Since there is no settled view of the validity of multiple personality disorder, and because of the very strong correlation with recovered memories of sexual abuse which is itself a disputed concept, there is a strong case for a consensus paper on multiple personality disorder based upon a substantial review of the literature.

This review seeks to provide clinical practitioners with some clear guidelines for practice, recognising the needs of those sexually abused in childhood but reducing the risk of creating false memories of abuse which will cause the patient and family further suffering.

No-one can fail to be aware of the highly intense and emotional debate which has polarised into two 'camps' which appear deaf to each others' arguments. The time has come to put aside the disputes and concentrate on maintaining and improving standards of practice and initiating more high-quality research. There is some evidence that past protagonists are now attempting to achieve reconciliation (Lindsay & Briere, 1997).

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In the Supreme Court of the United States

OCTOBER TERM, 1999

DAVID P. HOULT,
PETITIONER,

v.

JENNIFER HOULT,
RESPONDENT.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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INTRODUCTION

Respondent Jennifer Hoult (the "Respondent"), pursuant to Rule 15 of the Rules of the Supreme Court of the United States, hereby submits this brief in opposition to the Petition for a Writ of Certiorari (the "Petition") filed by David P. Hoult (the "Petitioner"). For the reasons set forth below, the Petition should be denied.

STATEMENT OF ISSUE

Whether certiorari should be denied where: (1) a decision of the United States Court of Appeals for the First Circuit upheld a decision of the United States District Court for the District of Massachusetts dismissing Petitioner's complaint for libel against Respondent because the central issue presented by the libel complaint — whether Petitioner repeatedly raped Respondent when she was a child — already had been litigated and determined in an earlier action between the parties; and (2) the Petitioner does not present any basis or compelling reason for the grant of certiorari, but rather seeks to collaterally attack a prior final decision which the First Circuit rendered four years ago?

STATEMENT OF THE CASE

In May 1996, Petitioner commenced an action (the "Libel Action") in the United States District Court for the District of Massachusetts (the "District Court") against the Respondent alleging, among other things, that Respondent had libeled him by writing in three letters (the "Letters") that Petitioner had repeatedly raped Respondent when she was a child.

Respondent moved to dismiss the Libel Action pursuant to Fed. R. Civ. P. 12(b)(6) on the ground that the issue of whether Petitioner had repeatedly raped her when she was a child had already been litigated and determined in her favor in a prior action between the parties (the "Abuse Action"), in which she obtained a $500,000 jury verdict on July 1, 1993.[1]

Respondent had commenced the Abuse Action in 1988, seeking damages from the Petitioner, her father, for the repeated rapes Petitioner had inflicted on Respondent during

[1] *Hoult* v. *Hoult*, United States District Court for the District of Massachusetts, Civil Action No. 88-1738 (verdict for Respondent July 1, 1993); motion to vacate denied August 8, 1994; denial of motion to vacate upheld, *Hoult* v. *Hoult*, 57 F. 3d 1 (1995).

the course of her childhood. At the time she commenced the Abuse Action, Respondent was 27 years old. The rapes Petitioner had inflicted on her had occurred years earlier. However, Respondent argued that because she had repressed the memory of the rapes, the statute of limitations was not a bar to her claims.

The Abuse Action was tried in the District Court in June and July, 1993. To counter Petitioner's defense that the statute of limitations barred Respondent's claims, Respondent presented expert testimony regarding the psychological phenomenon of repression in victims of childhood sexual abuse. After an 8-day trial, the jury first made a specific finding that the statute of limitations did not defeat Respondent's claims, and then rendered a general verdict and judgment of $500,000 in favor of the Respondent and against the Petitioner.

One year after the jury verdict and judgment in the Abuse Action, in July 1994, Petitioner brought a motion in the District Court to vacate the judgment, arguing that, under *Daubert* v. *Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), the District Court had improperly admitted the testimony of Dr. Renee Brant, Respondent's expert on repression in victims of childhood sexual abuse. The District Court denied Petitioner's Motion to Vacate the Judgment. Petitioner appealed to the First Circuit. The First Circuit upheld the District Court's decision.[2]

One year after the First Circuit upheld the judgment in the Abuse Action, petitioner commenced the Libel Action. As noted above, Respondent moved to dismiss the Libel Action, arguing that the judgment she won against Petitioner in the Abuse Action (as upheld by the First Circuit) collaterally estopped Petitioner from relitigating in the Libel Action the issue of whether he had raped Respondent.

The District Court heard Respondent's Motion to Dismiss on February 3, 1997. On February 14, 1997, the District

[2] *See Jennifer Hoult* v. *David P. Hoult*, 57 F.3d 1 (1995).

Court issued its Memorandum and Order (the First Order), granting the motion in part and denying it in part. The District Court ruled that, based on the judgment in the Abuse Action, Petitioner was collaterally estopped from claiming that Respondent had defamed him by writing that he "sexually abused" her. However, the District Court also ruled that Petitioner was not collaterally estopped from relitigating the issue of whether he had raped Respondent, as that precise issue was not necessarily determined by the general verdict rendered by the jury in the Abuse Action.

Respondent moved for reconsideration of that portion of the First Order which denied her Motion to Dismiss. In the Motion for Reconsideration, Respondent argued that the District Court had failed to recognize that the jury's specific finding that Jennifer's claims in the Abuse Action were not barred by the statute of limitations, in light of the testimony of her expert, Dr. Brant, necessarily included a finding that Petitioner had raped Respondent. Petitioner did not file an opposition to Respondent's Motion for Reconsideration.

On June 30, 1997, the District Court issued its Order on Respondent's Motion for Reconsideration (the "Order on Reconsideration"), allowing Respondent's motion, and dismissing the Libel Action in its entirety.

Petitioner appealed from the Order on Reconsideration on July 29, 1997. On the date Respondent's brief and appendix were due to be filed in the United States Court of Appeals for the First Circuit (the "First Circuit"), Petitioner filed a pleading styled "Suggestion of Bankruptcy", informing the First Circuit that he had filed a petition for relief under Chapter 7 of Bankruptcy Code in the United States Bankruptcy Court for the Middle District of Florida, Tampa Division (the "Bankruptcy Court"), and requesting that the First Circuit stay his appeal. The First Circuit denied Petitioner's request to stay his appeal.

After hearing oral argument, the First Circuit affirmed the District's Court's dismissal of the Libel Action by decision dated October 9, 1998. Petitioner moved for rehearing. The

First Circuit denied rehearing on November 9, 1998. After obtaining an extension of time within which to file the Petition, Petitioner filed the Petition on March 10, 1999. The Petition was docketed on April 22, 1999.

SUMMARY OF REASONS THE PETITION SHOULD BE DENIED

1. The Petition should be denied because the Petitioner seeks, in the guise of a petition for review of the First Circuit's ruling in the Libel Action, *Hoult* v. *Hoult*, 157 F 3d. 29 (1998) ("Hoult No. 2"), to obtain review of issues decided in the underlying Abuse Action and the First Circuit's affirmance of the judgment in the Abuse Action in *Hoult* v. *Hoult*, 57 F. 3d 1 (1995) ("Hoult No. 1"). Hoult No. 1 was decided four years ago in May, 1995. Accordingly, the time for seeking a writ of certiorari to review issues addressed and resolved in Hoult No. 1 is long past.[3]

2. The Petition should be denied because the First Circuit's well reasoned decision in Hoult No. 2 does not conflict with the decision of any other United States court of appeals; nor has the First Circuit in Hoult No. 2 decided an important federal question in a way that conflicts with a decision by a state court of last resort; nor has the First Circuit departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for exercise of this Court's supervisory powers. See Rule 10 of the Rules of the Supreme Court. Rather the First Circuit in Hoult No. 2 has engaged in a straightforward application of axiomatic legal principles. The Petitioner does not contend otherwise. In fact, the Petitioner does not even attempt to argue that the First Circuit's decision in Hoult No. 2 misapplied the doctrine of collateral estoppel. Instead, as noted

[3] In fact, Petitioner did seek to file a writ of certiorari in connection with Hoult No. 1. However, because the petition was filed after the deadline set forth in Rule 13 of the Rules of the United States Supreme Court, the clerk rejected it.

above, the Petition focuses on issues that were presented and decided in Hoult No. 1. The Petitioner cannot collaterally attack Hoult No. 1 through Hoult No. 2. Accordingly, as Petitioner has presented no compelling reason for this Court to grant certiorari to review Hoult No. 2, and as the time to seek certiorari for Hoult No. 1 has long past, the Petition should be denied.

STATEMENT OF FACTS

In the Libel Action, Petitioner claimed that Respondent libeled him by writing in the Letters that she was repeatedly raped by Petitioner during her childhood. As noted above, Respondent moved that the Libel Action be dismissed because the issue of whether Petitioner raped her already had been actually litigated and determined in her favor in the Abuse Action.

A. The Abuse Action

Respondent commenced the Abuse Action in July 1988 seeking to recover damages from Petitioner, her father, for the sexual abuse Petitioner inflicted on her during her childhood. The complaint in the Abuse Action specified the sexual abuse as

> . . . numerous acts of rape, of forcing [Respondent] to commit fellatio upon [Petitioner], of forcing her to submit to fondling and of exposing himself to her.

Respondent also alleged that these acts of sexual abuse were

> . . . invariably accompanied by force and by threats of even greater violence. At times [Petitioner] threatened to cut [Respondent] open or to rape her with a stick . . ., threatening to kill her or to do her great bodily harm.

Respondent claimed she initially repressed all memory of these abusive acts until, as an adult, she began to regain some memory of the horrors to which Petitioner had subjected her.

In the Abuse Action, Respondent initially sought recovery of the damages resulting from the sexual abuse she suffered in five counts: Assault and Battery[4]; Reckless or Intentional Infliction of Emotional Distress; Negligence; Negligent Infliction of Emotional Distress; and Breach of Fiduciary Duty. Respondent later withdrew the counts for Negligence and Negligent Infliction of Emotional distress, and, at trial, sought recovery on the three remaining counts.

While Respondent sought recovery in three counts, there was a single factual predicate for recovery: Respondent's allegations that while she was a child, Petitioner had repeatedly raped her.

The Abuse Action was tried to a jury over eight days in June and July 1993. From the outset, the focus of the Abuse Action was on Respondent's claim that Petitioner had repeatedly raped her during her childhood. For example, in the first sentence of her opening statement, Respondent's counsel framed for the jury the nature of the case and the heart of Respondent's claims as follows:

> Jennifer Hoult will live every day of her life with her memories of the *rape, torture and sexual abuse* that she suffered at the hands of her father, David Hoult, the defendant in this case.

(emphasis supplied).

In his opening statement, after brief introductory and general comments, Petitioner's counsel also told the jury that the case was about Respondent's allegations that Petitioner had repeatedly raped her during her childhood. In fact, in the 7 1/2 pages of trial transcript that comprise his opening

[4] Under Massachusetts law, there is no civil cause of action for rape. Such an action must be maintained under a theory of assault and battery. *See e.g., Glover* v. *Callahan*, 299 Mass. 55 (1937).

statement, Petitioner's counsel used the word "rape", or one of its variants, no less than 17 times.

At trial, Respondent testified about and described recovering the memory of seven specific incidents of sexual abuse. Respondent testified about her earliest memory of abuse, an occasion which occurred when she was about 4 years old, when Petitioner fondled and touched her on her breasts and between her legs. Respondent also described an incomplete memory of the beginning of a sexual attack. Her memory of that attack ended abruptly at a point where Petitioner had lifted her nightgown, placed his hand between her legs, and began to move his mouth down her body toward her genital area. In another incident she described, Petitioner forced her to commit fellatio upon him. In another attack, Petitioner tied Respondent's hands behind her and raped her while she lay face down on a couch. Respondent also described an incident when Petitioner raped her in the basement of the Hoult family home when she was in high school. Respondent testified that on another occasion when she was in high school Petitioner had raped her at her grandparents' home. Finally, Respondent testified about an occasion when Petitioner had raped her in her parent's bedroom at the family home in Wayland.

Petitioner denied Respondent's allegations, although, under cross examination, he did admit that he had grabbed the breasts of a teenage neighbor who had been hired to baby-sit his children—an act that Petitioner attempted to pass off as "goosing" a babysitter.[5]

Because Petitioner asserted the statute of limitations as a defense to Respondent's claims, the jury in the Abuse Action also heard testimony from an expert witness, Renee Brant, M.D., a Harvard educated psychiatrist, founder of the Child Abuse treatment team at Boston's Children's Hospital and specialist in the treatment of individuals who have been sexu-

[5] This incident contradicts Petitioner's claim that at trial of the Abuse Action there was no corrobration to Respondent's claims that her father was a child abuser. *See* Petition at 4.

ally abused as children. Among other things, Dr. Brant testified about how victims of childhood sexual abuse may repress and subsequently recover the memory of that abuse. Dr. Brant emphasized that repression of the memory of sexual abuse occurs in the context of *repeated* instances of sexual abuse over time. Dr. Brant also testified that in situations of repeated abuse, the severity of the abuse progresses over time, beginning with forms of touching and fondling, advancing to genital penetration and even to elements of sadism.

In their closing arguments in the Abuse Action, counsel for Petitioner and Respondent again framed for the jury that the principal issue to be determined was whether Petitioner had raped Respondent. Petitioner's counsel stated as follows:

> Good morning, ladies and gentlemen of the jury, as Judge Mazzone just pointed out to you, this part of the trial is the opportunity for each side to bring to your attention those matters that each of us believes to be important for your consideration and to highlight those portions of the case which we believe to be significant to our respective sides.
>
> As you know, having sat here for—or downstairs for several days, this case involves allegations brought by Jennifer Hoult against her father, my client, David Parks Hoult.
>
> Specifically, Jennifer alleges that her father sexually abused her. More specifically, Jennifer claims that her father raped her . . .

In closing arguments, Respondent's counsel summarized for the jury the conduct of the Petitioner which established Respondent's claim to damages. First, responding to Petitioner's counsel's suggestion that Respondent was seeking to characterize inappropriate hugs and kisses as sexual abuse, Respondent's counsel stated ". . . this [case] is not about hugging and kissing. She is claiming he assaulted her. He raped her. It's not inappropriate hugging and kissing."

In discussing damages, Respondent's counsel made clear that a necessary predicate for recovery was the repeated rapes Petitioner inflicted upon Respondent.

> Now, let me talk briefly about the harm that Jennifer has sustained as a result of these repeated sexual assaults by her father. As you heard Jennifer describe, her father forced her to have oral sex with him, performed oral sex on her, inserted his penis into her vagina, inserted his finger into her vagina. While he was doing these things, you heard the things he would say to her. He would call her a whore, a cunt. He would tell her he'd kill her if she ever told anyone.

In its jury instructions, the District Court reviewed the basis of Respondent's claims and framed for the jury the issue for determination as follows:

> [W]hat is this case about?
>
> The plaintiff, Jennifer Hoult, brought this lawsuit against defendant, David Parks Hoult, alleging that from the time she was approximately four years old and continuously thereafter until the age of 16 and perhaps on an isolated basis up to the age of 19, the defendant subjected her to numerous acts of sexual abuse. *As a result of the alleged acts of sexual abuse* the plaintiff has asserted the following claims under which she contends she is entitled to recover:
>
> (1) assault and battery;
> (2) infliction of emotional distress;
> (3) breach of fiduciary duty.

(emphasis supplied).

In instructing the jury on the count for Assault and Battery, the District Court focused the jury on the central issue as follows:

> Rape is a form of battery.
>
> Rape is defined as sexual intercourse and/or unnatural sexual intercourse with a person by force and against her will or by threat of bodily injury.
>
> Sexual intercourse is defined as the penetration of the female sex organ by the male sex organ, with or without emission.
>
> Unnatural sexual intercourse is defined as oral and anal intercourse, including fellatio, cunnilingus, and other intrusions of a part of a person's body or other object into the genital or anal opening of another person. A finger is comprehended within the meaning of the words "a part of a person's body" as used in the construction of words "unnatural sexual intercourse."
>
> Rape of a child is a commission of any of the above acts with a child under 16 by force or against her will or by threat of bodily injury. Further, a child under the age of 16 cannot consent to sexual contact with an adult.

With regard to Respondent's count for Intentional Infliction of Emotional Distress, the District Court instructed the jury that a finding for Respondent required Respondent's establishing by a preponderance of the evidence that:

(1) the *conduct* of the defendant was extreme and outrageous;
(2) the *conduct* was intentional or reckless;
(3) the plaintiff suffered emotional distress as a result of the plaintiff's *conduct;* and
(4) the emotional distress was severe.

(emphasis supplied).

Finally, with regard to Respondent's claim for breach of fiduciary duty, the District Court instructed the jury that Respondent had to show:

(1) that the defendant is her father;
(2) that the defendant initiated sexual contact between them; and
(3) that the defendant's initiation of sexual contact between them constitutes a breach of the defendant's fiduciary duties to care for and protect the well-being of his daughter.

The jury was given a specific question to answer on the issue of whether Respondent's claims were time-barred. The jury found that the statute of limitations did not bar Respondent's claims, thereby crediting the testimony that Respondent had repressed the memory of the sexual abuse she had suffered. The jury returned a general verdict for Respondent in the amount of $500,000 to "compensate [her] for any and all injuries suffered as a result of the *conduct* of the defendant." (emphasis supplied).

Judgment entered on July 14, 1993. Petitioner moved for a new trial pursuant to Fed. R. Civ. P. 59. He later appealed from the judgment. Petitioner's motion for a new trial was denied. Petitioner then appealed that decision. Ultimately each of Petitioner's appeals were dismissed for lack of prosecution.

On July 14, 1994, one year to the day after the entry of judgment in the Abuse Action, Petitioner filed a Motion to Vacate the Judgment (the "Motion to Vacate") pursuant to Fed. R. Civ. P. 60.

Notwithstanding the fact that Petitioner had made no objection to Dr. Brant's qualifications or to her testimony at trial, in his Motion to Vacate Petitioner argued, among other things, that the trial court erred in allowing Dr. Brant to testify. Petitioner argued that under *Daubert* v. *Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), the trial court should have precluded *sua sponte* Dr. Brant's testimony on repressed memory which Petitioner characterized as "junk

science."[6] After briefing and oral argument, the District Court denied Petitioner's Motion to Vacate.

Petitioner appealed the denial of his Motion to Vacate to the First Circuit. In Hoult No. 1, the First Circuit (Tourella, C.J.), affirmed the District Court's denial of the Motion to Vacate. The Petitioner then attempted to file a petition for certiorari from the First Circuit's decision in Hoult No. 1. However, the petition for certiorari was rejected because Petitioner filed it too late.

B. *The Libel Action*

In the March/April 1995 edition of the *Skeptical Inquirer*, Dr. Elizabeth F. Loftus, a psychologist who has provided expert testimony for defendants in so-called repressed memory cases but who was not involved in the Abuse Action, wrote about the Abuse Action and other repressed memory cases in an article (the "Article") entitled "Remembering Dangerously."

In the Article, Dr. Loftus mischaracterized Respondent's testimony in the Abuse Action, implied that Respondent's memories of the sexual abuse were false, and, by impugning the veracity of Respondent's testimony, held Respondent up to ridicule and derision. In addition, Dr. Loftus failed to disclose to the readers of that Article that she was a member and director of the False Memory Syndrome Foundation ("FMSF"), an advocacy group founded by people who claim to have been falsely accused of sexually abusing children.

After requesting and reviewing materials from the American Psychological Association ("APA"), a professional association to which Dr. Loftus belonged at the time she wrote the Article, Respondent concluded that Dr. Loftus's mischaracterization of the facts of the Abuse Action were a violation of the APA's ethical canons. To defend her reputation

[6] The decision in *Daubert* was issued on June 28, 1993. Dr. Brant began her testimony in the Abuse Action on June 24, 1993. Dr. Brant completed her testimony on June 28—the day *Daubert* was issued.

and challenge what she believed were the inaccuracies, innuendo and invective of Dr. Loftus's Article, Respondent, pursuant to APA procedures, filed a formal ethics complaint against Dr. Loftus with the APA.

Dr. Loftus resigned from the APA shortly after Respondent submitted that ethics complaint, and the APA subsequently declined to pursue the matter based upon Dr. Loftus's resignation.

Thereafter, Respondent learned that Dr. Loftus had been invited to serve as program director for a conference sponsored by the Southwestern Psychological Association ("SWPA") where the issue of so-called "false memories" was to be discussed. Believing that Dr. Loftus would again mischaracterize the proceedings, nature and testimony of the Abuse Action and thereby hold Respondent up to ridicule and derision, Respondent wrote SWPA's president and board in order to protect her reputation and to apprise them of the APA ethics complaint she had filed against Dr. Loftus and of the bases therefor.

Respondent later wrote the British Psychological Society ("BPS"), another professional association to which Dr. Loftus belongs, to formally complain about Dr. Loftus's conduct. Respondent requested the BPS to institute an ethics investigation of Dr. Loftus pursuant to its procedures. Respondent attached to this request a copy of the ethics complaint she had earlier filed with the APA.

Petitioner became aware of the Letters and, in May 1996, filed the Libel Action, alleging that Respondent had libeled him in the Letters by writing that he had raped her.

Respondent moved to dismiss the Libel Action pursuant to Fed. R. Civ. P. 12(b)(6) on the ground that the issue of whether Petitioner had repeatedly raped her when she was a child had already been litigated and determined in the Abuse Action as affirmed by Hoult No. 1, and, accordingly, that Petitioner was collaterally estopped from relitigating that issue.

The District Court heard Respondent's Motion to Dismiss on February 3, 1997. On February 14, 1997, the District Court issued its Memorandum and Order (the "First Order"), granting the motion in part and denying it in part. The District Court ruled that, based on the judgment in the Abuse Action, Petitioner was collaterally estopped from claiming that Respondent had defamed him by writing that he "sexually abused" her. However, the District Court also ruled that Petitioner was not collaterally estopped from relitigating the issue of whether he had raped Jennifer as that precise issue was not necessarily determined by the general verdict rendered by the jury in the Abuse Action.

Respondent moved for reconsideration of that portion of the First Order which denied her Motion to Dismiss. In the Motion for Reconsideration Respondent argued that the District Court had failed to recognize that the jury's specific finding that Respondent's claims in the Abuse Action were not barred by the statute of limitations, in light of the testimony of her expert, Dr. Brant, necessarily included a finding that Petitioner had raped Respondent. Petitioner did not file an opposition to Respondent's Motion for Reconsideration.

On June 30, 1997, the District Court issued its Order on Respondent's Motion for Reconsideration (the "Order on Reconsideration"), allowing Respondent's motion, and dismissing the Libel Action in its entirety.

Petitioner appealed from the Order on Reconsideration on July 29, 1997. On the date Respondent's brief and appendix were due to be filed in the First Circuit, Petitioner filed a pleading styled "Suggestion of Bankruptcy", informing the First Circuit that he had filed a petition for relief under Chapter 7, and requesting that the First Circuit stay his appeal.[7] The First Circuit denied Petitioner's request to stay

[7] In the Bankruptcy Court, Petitioner is seeking to discharge the judgment Respondent won against him in the Abuse Action. When Respondent moved for summary judgment of her claim that the Abuse Action judgment, which was based on Petitioner's repeated rapes of Respondent, was nondischargeable under Section 523 (a)(6) of the Bankruptcy Code which excepts from

his appeal. After hearing oral argument, the First Circuit affirmed the District's Court's dismissal of the Libel Action by decision dated October 9, 1998 (Hoult No. 2). Petitioner moved for rehearing. The First Circuit denied rehearing on November 9, 1998. After obtaining an extension of time within which to file the Petition, Petitioner filed the Petition on March 10, 1999. The Petition was docketed on April 22, 1999.

REASONS FOR DENYING THE PETITION

I. The Petition For The Decision In Hoult No. 2 Should Be Denied Because Petitioner Is Using It As A Guise To Seek Review Of Issues Decided In Hoult No. 1. The Time To Seek Certiorari For Hoult No. 1 Is Long Past.

In its decision in Hoult No. 2, the First Circuit, in upholding the District Court's dismissal of the Libel Action, concluded that:

> The present lawsuit seeks, in the guise of a defamation action, to retry the central issue in the prior assault case between the same litigants. That issue . . . was resolved by the jury at the first trial . . . its decision . . . is not now open to relitigation.

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discharge judgments based on "wilfull and malicious acts", Petitioner's counsel argued that summary judgment could not enter because there was a material issue of fact as to whether Petitioner *intended* to harm Respondent *when he raped her*. In an effort to avoid summary judgment, Petitioner's cousel, with Petitioner seated next to her, stated that *Petitioner would testify that while he did rape Respondent*, he did not intend to harm her, and, therefore, under this Court's recent decisions in *Kawaauhu* v. *Geiger*, 523 U.S. 57 (1998), the judgment was dischargeable. On the basis of this proffer of testimony, the Bankruptcy Court denied summary judgment, ruling that a genuine issue of material fact existed as to Petitioner's intent when he committed the rapes. In subsequent proceedings after the Bankruptcy Court denied summary judgment, Petitioner's counsel advised the court that Petitioner would not admit to the rapes.

See Hoult No. 2, which is appended to the Petition at App. 6.

In the same way Petitioner sought to retry issues that had been determined in the Abuse Action in the "guise" of the Libel Action, Petitioner here attempts to have this Court review issues that were addressed and resolved in Hoult No. 1 in the "guise" of a petition for certiorari from Hoult No. 2.

One need go no further than the Petitioner's statement of "Questions Presented" and a review of the First Circuit's decision in Hoult No. 1 (which is reproduced in the Appendix to the Petition beginning at App. 8) to discover that Petitioner's sole and exclusive interest here is in challenging the First Circuit's decision in Hoult No. 1—not in seeking the Court's review of the First Circuit's decision in Hoult No. 2.

Each of the questions presented by Petitioner relate to whether the District Court judge in the Abuse Action properly admitted the expert testimony of Dr. Brant regarding repression and recovery of the memory of childhood sexual abuse. The questions presented by Petitioner in his Petition are the same questions that were at issue in and decided by the First Circuit in Hoult No. 1. *See* Hoult No. 1, Petition at App. 10, where the court stated that: "Defendant's primary contention [in Hoult No. 1] is that the trial judge erred in allowing plaintiff's expert witness, Dr. Brant, to testify with respect to the phenomenon of repressed memory in the context of childhood sexual abuse."

In Hoult No. 1, the First Circuit rejected Petitioner's argument that the admission of Dr. Brant's testimony was error which required that the judgment in the Abuse Action be vacated.[8] Hoult No. 1 was decided on May 22, 1995. Pursuant to Rule 13 of this Court's Rules, Petitioner had 90 days from that date to seek certiorari from Hoult No. 1. Petitioner's 90 days are long past. He cannot use the decision in Hoult No. 2

[8] Among other things, the First Circuit noted that at no time, either before or during trial of the Abuse Action, did Petitioner object to Dr. Brant's qualifications as an expert witness or to her testimony in general. *See* Hoult, No. 1, Petition at App. 11.

to circumvent the results of his failure to timely seek and obtain certiorari from Hoult No. 1. For this reason alone, the Petition should be denied.[9]

II. There Are No Grounds To Grant Certiorari For The First Circuit's Decision In Hoult No. 2

In Hoult No. 2, the First Circuit affirmed the District Court's sound application of principles of collateral estoppel in dismissing the Libel Action. There are no grounds to grant certiorari to review that decision. Moreover, because the Petitioner focuses solely on issues that were addressed and decided by the First Circuit in Hoult No. 1, the Petition provides absolutely no basis for granting certiorari. The Petition offers no argument that in Hoult No. 2 the First Circuit misapplied the well-established principles of collateral estoppel in a manner

[9] Because the Petitioner cannot at this late date properly seek certiorari for the alleged errors of the trial court in the Abuse Action and the First Circuit in Hoult No. 1, it is not necessary here to address all of Petitioner's arguments regarding the admissibility of expert testimony on repressed memories of childhood sexual abuse. That said, it must be noted that Petitioner's argument that such testimony is or should be inadmissible under *Daubert* is contradicted by numerous cases, including *Shahzade* v. *Gregory*, 923 F. Supp. 286 (1996) where the United States District Court for the District of Massachusetts (Harrington, J.), in ruling on a motion in limine to preclude expert testimony on repressed and recovered memories of childhood sexual abuse, expressly held under a *Daubert* analysis that: (i) the scientific validity and reliability of the phenomenon of repressed memories has been established: (ii) testimony on the phenomenon of the repressed memory of sexual abuse is admissible; and (iii) in ruling that repressed memory evidence is admissible, a court does not rule on the credibility of the individual plaintiff's memories. The court stated: "For the law to reject a diagnostic category generally accepted by those who practice the art of psychiatry would be folly. Rules of law are not petrified in the past but flow with the current of expanding knowledge." *Shahzade* at 290. Likewise, in *Phinney* v. *Morgan*, 39 Mass. App. Ct. 202 (1995) *rev. den.*, 421 Mass. 1104 (1995), the Massachusetts Appeals Court stated: "*We recognize that because of the nature of the injury and the relationship of the parties, a child may repress all memory of the abuse*, lack undestanding of the wrongfulness of the conduct, or be aware of any harm or its cause *until years after the abuse*. *Phinney* at 204-205 (emphasis added).

which conflicts with decisions from other circuits; has decided an important federal question in a way that conflicts with a decision by a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's supervisory power. See Rule 10 of the Rules of the United States Supreme Court.

The First Circuit's decision in Hoult No. 2 (like the District Court's decision reviewed therein) was firmly grounded in the well-established legal doctrine of collateral estoppel, the contours of which, as the court in Hoult No. 2 observed, were "largely undisputed" by the parties to Hoult No. 2. *See* Hoult No. 2, Petition at App. 3.

The doctrine of collateral estoppel articulates the fundamental principle of jurisprudence that material facts or issues of law which were directly in issue in a former action, and were there judicially determined by a valid final judgment, are conclusively settled as between the parties in a subsequent action whether on the same or a different claim. *Grella* v. *Salem Five Cents Savings Bank*, 42 F.3d 26, 30 (1st Cir. 1994); and *Kalman* v. *Berlyn Corp.*, 614 F. Supp. 1327, 1329 (D. Mass. 1985). *See also* Restatement 2d Judgments § 27 (1982).

This basic doctrine, alternatively labeled collateral estoppel or issue preclusion, protects a party from the burden of relitigating issues that have been tried in a prior action and decided against the party's adversary. *Comair Rotron, Inc.* v. *Nippon Densan Corp.*, 49 F.3d 1535, 1537 (Fed Cir. 1995); and *DeCosta* v. *Viacom Int'l., Inc.*, 981 F.2d 602, 605 (1st Cir. 1992), *cert. den.* 509 U.S. 923 (1993). Preclusion of the relitigation of issues previously adjudicated serves the interests of judicial economy and, by preventing the possibility of inconsistent decisions, the reliability of judgments. *Allen* v. *McCurry*, 449 U.S. 90, 94-96 (1980).

As the District Court and First Circuit found, the Respondent established each of the essential elements for collateral estoppel. The Petitioner does not contend otherwise. Accordingly, the First Circuit properly upheld the District Court's

ruling that the doctrine of collateral estoppel precluded Petitioner from relitigating the issue of whether he raped Respondent. More importantly, the First Circuit's ruling does not conflict with any decision or any other United States Court of Appeal; does not conflict with any decision of any state court of last resort; and does not depart from the usual course of judicial proceedings. Rather, the First Circuit in Hoult No. 2 engaged in a straightforward application of axiomatic legal principles. Accordingly, there is no reason (and, as noted above, Petitioner has provided no reason) for this Court to grant the Petition.

A. *The First Circuit Properly Upheld the District Court's Conclusion That The Central Issue Of The Libel Action—Whether Petitioner Raped the Respondent—Was Actually Litigated And Decided In The Abuse Action*

In the Libel Action, Petitioner alleged that Respondent libeled him in the Letters by writing that during her childhood Petitioner repeatedly raped her. As set forth above, the very statements Petitioner claimed were libelous were the basis of Respondent's complaint against Petitioner in the Abuse Action. The issue framed for adjudication by the complaint in the Libel Action was identical to the central issue that was presented in the Abuse Action. Moreover, the testimony of the witnesses, the arguments of counsel and the jury instructions in the Abuse Action also make clear that the central issue tried and determined in the Abuse Action was the same issue raised by the Libel Action.

B. *The First Circuit Correctly Upheld The District Court's Ruling That The Issue Of Whether Petitioner Raped The Respondent Was Actually Litigated In The Abuse Action*

As noted above, in the first sentence of her opening statement at trial in the Abuse Action, Respondent's counsel

focused the jury on the allegations which would form the basis of Respondent's recovery:

> Jennifer Hoult will live every day of her life with her memories of the rape, torture and sexual abuse that she suffered at the hands of her father, David Hoult, the defendant in this case.

Respondent then testified about the sexual abuse she suffered at Petitioner's hands, detailing numerous acts of rape.

At the close of evidence in the Abuse Action, counsel for Respondent and counsel for Petitioner each argued to the jury that the Abuse Action was about Respondent's claims that she had been sexually abused by being repeatedly raped by Petitioner.

Finally, in its jury instructions, the court in the Abuse Action framed the issue that had been litigated and which the jury was to determine as follows:

> [W]hat is this case about?
>
> The plaintiff, Jennifer Hoult, brought this lawsuit against the defendant, David Parks Hoult, alleging that from the time she was approximately four years old until the age of 16 and perhaps on an isolated basis up to the age of 19, the defendant subjected her to numerous acts of sexual abuse. As a result of the alleged abuse, the plaintiff has asserted the following claims under which she contends she is entitle to recover: (1) assault and battery; (2) infliction of emotional distress; and (3) breach of fiduciary duty.

In its instructions on the Assault and Battery count, the court gave a detailed instruction on rape, making even more clear that the issue upon which the jury should be focused was Respondent's claim that Petitioner had repeatedly raped her during the course of her childhood.

> Rape is a form of battery. Rape is defined as sexual intercourse and/or unnatural sexual intercourse with a person by force and against her will or by threat of bodily injury. Sexual intercourse is defined as the penetration of the female sex organ by the male sex organ, with or without emission. Unnatural sexual intercourse is defined as oral and anal intercourse, including fellatio, cunnilingus, and other intrusions of a part of a person's body or other object into the genital or anal opening of another person. A finger is comprehended within the meaning of the words part of a person's body as used in the construction of the words unnatural sexual intercourse. Rape of a child is a commission of any of the above acts with a child under 16 by force or against her will or by threat of bodily injury. Further a child under the age of 16 cannot consent to sexual contact with an adult.

The First Circuit (and the District Court) considered the foregoing record, and correctly concluded that "the rape charges were the centerpiece of [the Abuse Action]" and that any argument to the contrary "is a wholly unrealistic assessment of a trial in which the rapes were the central and pivotal issue, the fondlings were the preface to the rapes, and the violence was connected to the rapes (either as a part of the rapes or to encourage silence)". *See* Hoult No. 2, Petition at App. 4 and 6. The record reviewed by the District Court and First Circuit leaves no doubt that the central issue raised by the Libel Action—whether Petitioner repeatedly raped Respondent during her childhood—was actually litigated in the Abuse Action.

C. *The First Circuit Correctly Upheld The District Court's Ruling That The Issue Of Whether Petitioner Raped the Respondent Was Necessarily Determined In The Abuse Action*

The doctrine of collateral estoppel precludes relitigation of issues necessarily determined in a prior action even where

there is no specific finding or reference to those issues in the judgment. *Grella, supra*, 42 F.3d at 30-31 ("[a]n issue may be 'actually' decided even if it is not *explicitly* decided, for it may have constituted, logically or practically, a necessary component of the decision reached in the prior litigation." (emphasis in original) (*quoting Dennis* v. *Rhode Island Hosp. Trust*, 744 F. 2d 893, 899 (1st Cir. 1984)); accord *Campbell* v. *State of Maine, et al;* 632 F. Supp. 111, 119 (D. Me. 1985), *aff'd*, 787 F. 2d 776 (1st Cir. 1986) (citing *Dennis*); and *In Re Belmont Realty Corp.*, 11 F 3d 1092, 1097 (1st Cir. 1993).

Stated another way, an estoppel by judgment will operate where an issue attempted to be raised in a second case was central to the route that led the factfinder to the judgment reached. *Commercial Associates* v. *Tilcon Gammino, Inc.*, 998 F.2d 1092 (1st Cir. 1993).

As the First Circuit correctly observed (Hoult No. 2, Petition at App. 3), the fact that the jury in the Abuse Action rendered a "general verdict" without an explicit finding of rape does not mean that the issue was not decided or that it did not constitute, "logically or practically, a necessary component of the decision reached." *Dennis* v. *Rhode Island Hospital Trust National Bank, supra*, 744 F. 2d at 899. The First Circuit properly examined the whole record of the Abuse action to determine "whether a rational jury could have grounded its verdict upon an issue other than that which the [Respondent] seeks to foreclose from consideration." *Ashe* v. *Swenson*, 397 U.S. 436, 444 (1970). In considering the whole record of the Abuse Action, the First Circuit (like the District Court) properly concluded that "the rape charges were the centerpiece of [Respondent's] case" and any argument to the contrary would be "a wholly unrealistic assessment of a trial in which the rapes were the central and pivotal issue." *See* Hoult No. 2, Petition at App. 4 and 6.

1. *The First Circuit Properly Ruled That The Jury's Finding On The Statute Of Limitations Question In The Abuse Action Necessarily Included A Finding That Petitioner Had Repeatedly Raped Respondent*

At trial in the Abuse Action, Respondent testified to repressing and then recovering the memory of a long history of sexual abuse inflicted on her by Petitioner. Respondent specifically detailed for the jury several incidents where Petitioner raped her (according to the definition of rape used by the trial court in its jury instructions).

To support her claim that she had repressed the memory of the sexual abuse she suffered from Petitioner, and to counter Petitioner's statute of limitations defense, Respondent presented an expert—Dr. Renee Brant. Dr. Brant testified that an explanation for Respondent's lapse of memory regarding the abuse she suffered was the psychological defense mechanism of repression.

Most significantly, Dr. Brant testified that repression is the "kind of psychological defense mechanism that especially comes into play in situations of *repeated* trauma over time." Dr. Brant also emphasized that if Respondent repressed memory of sexual abuse, the repression she experienced would be the result of *repeated* instances of sexual abuse—not just a single isolated incident or a few random incidents.

The jury obviously credited Dr. Brant's testimony in specifically finding that Respondent's repression defeated Petitioner's statute of limitations defense. Moreover, because the "repeated" incidents of sexual abuse over time described by Respondent were rapes, in finding that Respondent repressed the memory of the sexual abuse she suffered, the First Circuit and District Court correctly concluded that the jury necessarily found that Petitioner raped Respondent.

2. *The First Circuit Also Correctly Concluded That The Record Of The Abuse Action Taken As A Whole Demonstrates That The Jury Determined That Petitioner Raped Respondent*

The fact that the jury verdict in the Abuse Action necessarily determined that Petitioner raped Respondent is not only apparent from the manner in which the jury answered the statue of limitations question, it also is clear from the record taken as a whole. Where the judgment does not explicitly determine a particular issue that was undoubtedly raised and contested by the parties in an earlier action, a court in a second action is free to go beyond the judgment to examine the pleadings and entire record in determining whether collateral estoppel applies. *Precision Air Parts, Inc.* v. *Avco Corp.*, 736 F. 2d 1499, 1502 (11th Cir.) *reh'g den.*, 744 F.2d 97 (1984) *cert. den.* 469 U.S. 1191 (1985). The record in the Abuse Action, including the pleadings, the evidence, the trial court's jury instructions, and the arguments of counsel are further proof that the verdict must be read to include a finding that Petitioner raped Respondent.

From the outset, the Abuse Action was first and foremost about the claim that Petitioner had raped Respondent. The complaint in the Abuse Action makes this clear. The opening statements of counsel at trial of the Abuse Action—especially that of Petitioner's counsel—do as well. Respondent's testimony, in which she detailed the occasions when Petitioner raped her and her recovery of the memory of that abuse, also shows that the Abuse Action was first and foremost about Respondent's claim that Petitioner had repeatedly raped her when she was a child.

In its general instruction, the Abuse Action trial court told the jury that the case was about Respondent's claims that "from the time she was approximately four years old . . . the defendant subjected her to numerous acts of sexual abuse." The trial court went on to instruct the jury that "[a]s a result of the alleged acts of sexual abuse the plaintiff has asserted

the following claims under which she contends she is entitled to recover: (1) assault and battery; (2) infliction of emotional distress; and (3) breach of fiduciary duty." This general instruction makes clear that a finding for Respondent on any of the three counts depended upon a finding that she had been sexually abused. However, the trial court did not stop there, but focused the jury on the fact that the sexual abuse alleged consisted of repeated rapes.

For example, in its instruction on Assault and Battery, the trial court directed the jury to focus on Respondent's claim that Petitioner raped her as a predicate for finding a battery. The trial court specifically informed the jury that "rape is a form of battery", and explained in great detail that "rape" would include incidents of forced oral and digital penetration as well as genital penetration. The focus of the trial court's instruction on rape as the battery at issue demonstrates that in finding for Respondent, the jury found that Petitioner had raped her.

The trial court's general instruction demonstrates that any finding for Respondent on her other two counts against Petitioner also had to be premised on acts of sexual abuse. And when the trial court's jury instructions on the other two counts are read in the context of the testimony and arguments of counsel it is clear that the only "conduct" which could have been a predicate for a finding for Respondent were the repeated rapes Petitioner inflicted upon her.

In short, as the First Circuit and District Court ruled, a consideration of the pleadings, testimony, arguments of counsel and jury instructions in the Abuse Action make clear that the jury found for Respondent because they determined that Petitioner had raped her, and that (as the First Circuit stated) any argument to the contrary "is a wholly unrealistic

assessment of a trial in which the rapes were the central and pivotal issue."[10]

CONCLUSION

As the foregoing demonstrates, there are no compelling reasons to grant the Petition. Accordingly, the Petition should be denied.

JENNIFER HOULT

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Dated: May 24, 1999

[10] News reports of the verdict in the Abuse Action demonstrate that journalists who covered and reported on the proceedings understood the verdict to be based on a determination that Petitioner had raped Respondent. *See, e.g.*, "**MAN MUST PAY $500,000 FOR RAPING DAUGHTER**," The Boston Globe, Friday, July 2, 1993, p. 1 and "**DAD TO PAY 500G IN DAUGHTER RAPES**", New York Daily News, July 3, 1993.